

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

1993

Motherhood and Crime

Dorothy E. Roberts

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), [Criminology Commons](#), [Criminology and Criminal Justice Commons](#), [Family, Life Course, and Society Commons](#), [Gender and Sexuality Commons](#), [Law and Gender Commons](#), [Law Enforcement and Corrections Commons](#), [Legal History Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Repository Citation

Roberts, Dorothy E., "Motherhood and Crime" (1993). *Faculty Scholarship at Penn Law*. 854.
https://scholarship.law.upenn.edu/faculty_scholarship/854

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Motherhood and Crime[†]

Dorothy E. Roberts*

INTRODUCTION

Women's criminal conduct is of growing interest to both criminologists and legal scholars.¹ Feminist legal theorists recently have embraced the subject of motherhood.² There is important insight into the social construction of women's identities where these two topics meet. To find evidence of a special relationship between motherhood and crime, students need only to open their first year criminal law casebook to the omission liability section.³ Most of the cases, if not all, concern mothers (or women in mothering roles) who failed to care properly for their children.⁴ These

†©1993 Dorothy E. Roberts.

*Visiting Associate Professor, University of Pennsylvania Law School, Associate Professor, Rutgers University School of Law-Newark. B.A. 1977, Yale College; J.D. 1980, Harvard Law School. This Article is based on the Fifth Annual Criminal Justice Lecture presented at Rutgers University School of Law-Newark in October 1992. I presented an earlier draft of this Article at the University of Maryland School of Law and Seton Hall University School of Law Legal Theory Workshops, the University of Chicago Law School Feminist Legal Theory Workshop, and the Clason Lecture, Western New England College School of Law, and thank the participants for their comments. I especially am grateful to Taunya Banks for her suggestions and support. Jorge Martinez, Dierdre Mason, Jillan Stoddard, James Tabano, and Guy Winters provided valuable research assistance. I would also like to thank my students, Joyce Apsel-Freedman, Kay Ehrenkrantz, and Devora Lindeman for sharing with me their thoughts on motherhood and child abuse.

1. Numerous books on women and crime in the United States and Great Britain have been published in the last decade. *See, e.g.*, Pat Carlen, *Women, Crime and Poverty* (1988); *Gender, Crime and Justice* (Pat Carlen & Anne Worrall eds., 1987); Frances Heidensohn, *Women and Crime* (1985); Allison Morris, *Women, Crime and Criminal Justice* (1987); *Women and Crime in America* (Lee H. Bowker ed., 1981); Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (1990).

2. Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 *Hastings L.J.* 1017, 1020 n.8 (1992); Carol Sanger, *M Is for the Many Things*, 1 *S. Cal. Rev. L. & Women's Stud.* 15, 20-31 (1992); *see, e.g.*, Martha A. Fineman, *The Neutered Mother*, 46 *U. Miami L. Rev.* 653 (1992); Symposium on Reconstructing Motherhood, 1 *S. Cal. Rev. L. & Women's Stud.* 1 (1992). Recent feminist writings about motherhood include Miriam M. Johnson, *Strong Mothers, Weak Wives* (1988); Audre Lorde, *Man Child: A Black Lesbian Feminist's Response*, in *Sister Outsider* 72 (1984); *Mothering: Essays in Feminist Theory* (Joyce Trebilcock ed., 1984) [hereinafter *Mothering*]; Jane Swigart, *The Myth of The Bad Mother: The Emotional Realities of Mothering* (1990).

3. The doctrine of omission liability bases criminal liability on a person's failure to perform a legal duty rather than the usual requirement that she perform an affirmative act. *See* Wayne LaFare & Austin Scott, *Substantive Criminal Law* § 3.3(6) (1986); Paul Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 *N.Y.L. Sch. L. Rev.* 101 (1984).

4. Phillip E. Johnson, *Criminal Law: Cases, Materials and Text* 54-58 (4th ed. 1990) (quoting *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962)); Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 207 (5th ed. 1989) (quoting *Jones*); John Kaplan & Robert Weisberg, *Criminal Law: Cases and Materials* 80-81 (2d ed. 1991) (quoting

cases demonstrate that criminal law is more likely to impose an affirmative duty on mothers than other classes of people.

I usually push my criminal law students to determine the extent of the obligation mothers owe their children when we discuss *Commonwealth v. Howard*.⁵ In *Howard*, a mother was convicted of manslaughter for failing to protect her young child from her boyfriend's deadly abuse.⁶ "Must a mother forego all self-interest, take on any risk, in order to avoid criminal liability?" I ask. "Must she even risk injury to herself in order to ensure her children's safety?" At least one student will invariably respond: "A mother must be willing to give up her own life in order to protect her children from harm."

This special relationship between motherhood and crime should be a prominent subject of feminist inquiry. Motherhood, like sexuality, plays a critical role in women's subordination.⁷ Martha Fineman calls motherhood "a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology."⁸ A woman's status as childbearer determines her identity. Society assigns women the enormous responsibility of childrearing. Society not only does not pay women for this labor, but degrades it as well. To the extent society values women's role as mother, it does so only when the events of motherhood attach to a legal father.⁹ Despite this fact, no woman achieves her full position in society until she gives birth to a child. Being a mother is women's major social role: Society defines all women as mothers or potential mothers. Society, at one level or another, exerts structural and ideological pressures upon women to become

Jones); Wayne R. LaFare, *Modern Criminal Law, Cases, Comments and Questions* 217 (2d ed. 1988) (quoting *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986)); Paul H. Robinson, *Fundamentals of Criminal Law* 155-67 (1988) (quoting *Commonwealth v. Howard*, 402 A.2d 674 (Pa. Super. Ct. 1979) and *Jones*); see Nancy S. Erickson, Final Report: "Sex Bias in the Teaching of Criminal Law," 42 Rutgers L. Rev. 309, 422-27 (1990).

5. 402 A.2d 674 (Pa. Super. Ct. 1979).

6. See *id.* Howard's boyfriend had beaten and tortured Howard's five-year-old daughter for a period of several weeks before the child's death. The child died when, during the course of one of these beatings, she fell and hit her head on a piece of furniture. Howard challenged her manslaughter conviction on grounds that the evidence was insufficient to prove that her actions were reckless or directly caused her daughter's death. The appellate court upheld her conviction, reasoning that Howard failed to perform her legal duty to protect her child and "knowingly consented" to her boyfriend's abuse.

7. See generally Nancy Chodorow, *The Reproduction of Mothering* 9 (1978) ("[W]omen's mothering is a central and defining feature of the social organization of gender and is implicated in the construction and reproduction of male dominance itself."); Adrienne Rich, *Of Woman Born* (1976) (describing how the institution of motherhood oppresses women and suggesting a vision of a liberated motherhood).

8. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 Duke L.J. 274, 289-90.

9. See Adrienne Rich, *Motherhood in Bondage*, in *On Lies, Secrets, and Silence* 195, 196 (1979) (noting that society does not admire mothers who are unwed, lesbians, or on welfare); Rich, *supra* note 7, at 42 ("Motherhood is 'sacred' so long as its offspring are 'legitimate'—that is, as long as the child bears the name of a father who legally controls the mother.")

mothers.¹⁰

This social meaning of motherhood does not define women's experience of mothering. Adrienne Rich distinguished between motherhood, the experience—the relationship between a woman and her children—and motherhood as enforced identity and political institution.¹¹ Some women may experience mothering as debilitating and intrusive. Even though some feminist theory calls motherhood oppressive, many women experience fulfillment and happiness in mothering. Motherhood contains this fascinating paradox: Although it is devalued, exhausting, confining, and a principal way that women are shackled to an inferior status, motherhood is for many women life's greatest joy. This Article discusses motherhood in a way that neither denies women's oppression in motherhood, nor women's pleasure in mothering.¹²

The law compels and legitimates prevailing relationships of power. Criminal law not only defines and mandates socially acceptable behavior, it also shapes the way we perceive ourselves and our relationships to others.¹³ Legal rules reward conduct that fulfills a woman's maternal role and punish conduct that conflicts with mothering.¹⁴ Society's construction of mother,

10. Although social policy and popular mythology devalue Black motherhood, the dominant ideology that all women are destined to bear children nevertheless influences Black women. On the devaluation of Black motherhood, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *Harv. L. Rev.* 1419, 1436-44 (1991).

11. See Rich, *supra* note 9, at 196; see also Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 *New Eng. L. Rev.* 521, 536 (1988) (arguing that women experience pregnancy and childbirth within the context of cultural constructs very differently); Iris M. Young, *Is Male Gender Identity the Cause of Male Domination?*, in *Mothering*, *supra* note 2, at 129, 134 (distinguishing gender differentiation—a phenomenon of individual psychology and experience—from male domination, that is the structural relations of genders and institutional forms that determine those structures). Even though the personal experience of mothering can be distinguished from the institution of motherhood, the dominant society's construction of motherhood influences individual mothers' experiences. See Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 *Fla. L. Rev.* 25, 38 (1990).

12. See Patricia H. Collins, *Black Feminist Thought* 118 (1991) ("Some women view motherhood as a truly burdensome condition that stifles their creativity, exploits their labor, and makes them partners in their own oppression. Others see motherhood as providing a base for self-actualization, status in the Black community, and a catalyst for social activism."); see also Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 *S. Cal. Rev. L. & Women's Stud.* 135, 142-67 (1992) (describing the emotional meaning of mothering and the reasons for silence about maternal feelings in legal scholarship); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women's L.J.* 81, 93 (1987) (criticizing feminist legal theorists for paying too little attention to hedonistic ideals and women's experiences of happiness and pleasure).

13. See generally Carol Smart, *Feminism and the Power of Law* (1989) (exploring how law, particularly criminal law, enforces an account of social reality); Richard C. Boldt, *The Construction of Responsibility in Criminal Law*, 140 *U. Pa. L. Rev.* 2245 (1992) (discussing how the criminal law creates and maintains a perspective on human behavior).

14. See Katharine T. Bartlett, *Re-expressing Parenthood*, 98 *Yale L.J.* 293 (1988) (arguing that child custody law expresses an undesirable view of parenthood); Mary J. Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 *Harv. L. Rev.* 1045, 1050, 1059 (1992) (discussing the "maternalization of the female body"); cf. Mary E. Odem, *Fallen Women and Thieving Ladies: Historical Approaches to Women and Crime in the United*

its image of what constitutes a good mother and what constitutes a bad mother, facilitates its continuing control of women. Society considers women who fail to meet the ideal of motherhood deviant or criminal.¹⁵ It stigmatizes unwed mothers, unfit mothers, and women who do not become mothers for violating the dominant norm.¹⁶ Considering our society's general neglect of children, it is probable that laws which punish mothers' conduct do so just as much to enforce gender roles as to protect children.¹⁷

Given the centrality of motherhood to women's social position and the importance of criminal law in enforcing ideology and social structure, feminist inquiry should critically examine the criminal law's treatment of mothers. To date, both feminist criminologists and legal scholars have devoted surprisingly little attention to this subject. Feminist analyses of crime tend to concentrate on men's victimization of women rather than women's criminal offenses.¹⁸ When feminist scholars examine female crime, they usually study juvenile delinquency, property crimes, and prostitution.¹⁹

There are several points in the cycle of motherhood at which to examine criminal law's treatment of mothers. A mother may become a

States, 17 *L. & Soc. Inquiry* 351 (1992) (book review) (discussing the legal history of the criminal punishment of women for inappropriate sexual behavior). Focusing on the extreme cases of maternal violence or criminal neglect might distort the nature of mothers' relationships with their children. *Cf.* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *Mich. L. Rev.* 1, 2-3 (1991) (arguing that sensational cases of domestic violence "disguise the commonality of violence against women"). However, the criminal law's treatment of mothers contributes to the social meaning of motherhood that affects the lives of all women.

15. *See* Fineman, *supra* note 8, at 285-89 (discussing how contemporary poverty discourse casts single mothers as pathological and a primary explanation for poverty); Roberts, *supra* note 10, at 1436 ("Society is much more willing to condone the punishment of poor women of color who fail to meet the middle-class ideal of motherhood."); *infra* notes 53-93 and accompanying text.

16. *See* Edwin M. Schur, *Labeling Women Deviant: Gender, Stigma, and Social Control* 81-92 (1983). The dominant meaning of motherhood depends on its historical and cultural context and changes in response to social and political developments. *See* Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women*, 18 *Queen's L.J.* 306, 311 (1993); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *J. Gender & L.* 1, 7 (1993). This Article's use of examples of mothers from various historical periods does not discount the historical particularity of the meaning of motherhood.

17. *Cf.* Bartlett, *supra* note 14, at 303 (arguing that the "best interests of the child" standard courts apply in custody decision making is a "highly contingent social construction" determined by social judgments rather than by neutral scientific facts).

18. Perhaps feminist theory concentrates on men's violence against women because it so directly imposes patriarchal power. Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 *Just. Q.* 497, 513 (1988).

19. *See, e.g.,* *Feminist Perspectives in Criminology* (Loraine Gelsthorpe & Allison Morris eds., 1990) (including chapters on "young women in trouble" and criminology generally); *Gender, Crime and Justice*, *supra* note 1 (including chapters on welfare fraud and prostitution); Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (1976) (discussing prostitution). In my review of numerous books on women and crime, I could not find a single chapter concerning criminal mothers. For an exceptional treatment of criminal mothers, see Marie Ashe & Naomi R. Calm, *Child Abuse: A Problem for Feminist Theory*, 2 *Tex. J. Women & L.* 75 (1993).

criminal even before the birth of her child. Some criminal laws punish a woman's conduct during pregnancy.²⁰ Criminalizing abortion reinforces the norm that women should want to bear children because it quite literally compels women to become mothers.²¹ Society considers a woman's refusal to bear a child an unnatural act, a rebellion against her essential role.

Mothers' crimes also include killing or abandoning their newborn babies.²² Fathers who abandon their children can escape criminal responsibility simply by leaving the children with their mother. As long as he is not living with the mother, the father escapes responsibility when his failure to provide harms the child.²³ Mothers, conversely, have an immediate and

20. Several states have recently expanded the statutory definition of neglected children to include infants who test positive for controlled substances at birth. See Fla. Stat. Ann. § 415.503(9)(A)(2) (West Supp. 1990); Ill. Juvenile Ct. Act, Ill. Ann. Stat. ch. 37, para. 802-3, § 2-3(1)(c) (Smith-Hurd Supp. 1990); Ind. Code Ann. § 31-6-4-3.1(1)(b) (West Supp. 1990); Mass. Gen. L. ch. 119, § 51A (Supp. 1990); Nev. Rev. Stat. Ann. § 432B.330(1)(b) (Michie 1991); Okla. Stat. Ann. tit. 10, § 1101(4)(c) (West Supp. 1991). On the regulation of pregnant women's conduct, see Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, The Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 Ohio St. L.J. 1205 (1992); Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. Pa. L. Rev. 179 (1989). I have argued elsewhere that the prosecution of poor Black women for using drugs during pregnancy punishes them for having babies, rather than for their prenatal conduct. See Roberts, *supra* note 10.

21. Andrea Dworkin, *Abortion*, in *Right Wing Women* 71 (1983); cf. Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DePaul L. Rev. 1369, 1397 (1992) (reviewing Carmel Shalev, *Birth Power* (1989)) (comparing the disparate treatment of women's decisions to terminate a pregnancy and to put a child up for adoption: "It is hard to escape the conclusion that the coerced loss of a child through adoption is considered a harm to women, but forced motherhood is not."). Andrea Dworkin explains why women who have abortions are deemed to be criminals:

She has learned (*learned* is a poor word for what has happened to her) that every life is more valuable than her own; her life gets value through motherhood, a kind of benign contamination. . . . Abortion turns a woman into a murderer all right: . . . she kills her allegiance to Motherhood First. This is a crime. She is guilty: of not wanting a baby.

Dworkin, *supra*, at 74. Evidence that a woman did not want a baby may also help to prove guilt of maternal crimes other than abortion. See *Rinker v. State*, 565 N.E.2d 344, 346-47 (Ind. Ct. App. 1991) (holding it was not reversible error to admit testimony that a mother charged with neglect stated prior to her son's birth that she did not want any more children); Anna L. Tsing, *Monster Stories: Women Charged with Perinatal Endangerment*, in *Uncertain Terms: Negotiating Gender in American Culture* 282, 292 (Faye Ginsburg & Anna L. Tsing eds., 1990) [hereinafter *Uncertain Terms*] (noting the statement of a district attorney prosecuting a mother for infanticide that "[m]y time frame [for understanding her culpability] begins on the day that she finds out she can't have an abortion").

22. See David Bakan, *Slaughter of the Innocents* 30-44 (1971) (discussing infanticide in several cultures).

23. Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, in *1A Current Perspectives in Psychological, Legal and Ethical Issues: Children and Families: Abuse and Endangerment* 197, 199-200 (Sandra A. Garcia & Robert Batev eds., 1991). Criminal nonsupport charges against fathers are rare. *Id.* at 213 n.19.

unavoidable duty to care for their newborn children.²⁴

This Article has two purposes. Both involve the feminist task of situating women's crimes within the context of patriarchal power. First, this Article explores how laws criminalizing maternal conduct construct the meaning of motherhood. Second, this Article attempts to assess mothers' crimes in relation to women's struggle against a self-annihilating role, a struggle often resulting in family violence. This Article does not focus on general criminal behavior of mothers, but instead centers on crimes characterized by a failure to mother.

This Article does not debate whether motherhood is a natural source of women's power or whether it is inherently oppressive.²⁵ Motherhood is constructed socially and, as structured presently, subordinates women.²⁶ This Article examines how the criminal law enforces the subordinating aspects of motherhood and punishes women's resistance. This Article does not celebrate women's essential nature as mothers in a manner similar to cultural feminism.²⁷ Rather, it explores the nature of women's resistance to

24. *Vaughan v. Commonwealth*, 376 S.E.2d 801, 804 (Va. Ct. App. 1989); see Tsing, *supra* note 21, at 283 (noting from her study of American women charged with endangering their newborns during unassisted birth that "the fact that a woman gave birth alone was seen as evidence or cause of her criminal neglect of the newborn").

A number of feminist scholars have noted that the law treats motherhood as an obligation and fatherhood as a choice. See generally Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415 (1991) (observing that courts treat women as "draftees" and men as "volunteers" to parenthood); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. Rev. 637, 648 (1993) (stating that family law views fathers' social relationship to their children as a "cultural creation—and a choice—not an automatic correlate of a biological tie"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 935, 996-97 (1984) (noting that courts tend to view fathering in terms of "opportunity" and mothering in terms of "responsibility").

25. Compare Jeffner Allen, *Motherhood: The Annihilation of Women*, in *Mothering*, *supra* note 2, at 315 (calling for women to "evacuate" motherhood) with Eva F. Kittay, *Womb Envy: An Explanatory Concept*, in *Mothering*, *supra* note 2, at 94 (calling for women to reclaim childbirth).

26. See Johnson, *supra* note 2, at 25-43 (arguing that women's subordination is rooted in the way marriage institutions control and organize women's mothering rather than in mothering itself); Rich, *supra* note 7, at 41-83 (discussing the patriarchal meaning of motherhood); Fineman, *supra* note 8, at 285-89 (discussing how the representation of single mothers in contemporary poverty reform discourse reflects patriarchal ideology).

27. For a helpful critique of cultural feminism, see Linda Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis In Feminist Theory*, 13 *Signs* 405, 408-14 (1988). Alcoff identifies the belief "that it is our specifically female anatomy that is the primary constituent of our identity and the source of our female essence" as the central tenet of cultural feminism. *Id.* at 410; see also Alice Echols, *The New Feminism of Yin and Yang*, in *Powers of Desire: The Politics of Sexuality* 439, 441 (Ann Snitow et al. eds., 1983) (describing cultural feminism as the equation of "women's liberation with the development and preservation of a female counter-culture"); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 28-42 (1988) (comparing cultural and radical feminist views of motherhood). According to Alcoff, the primary problem with cultural feminism is its limited ability to direct social change:

To the extent cultural feminism merely valorizes genuinely positive attributes developed under oppression, it cannot map our future long-range course. To the extent that it reinforces essentialist explanations of these attributes, it is in danger of solidifying an important bulwark for sexist oppression: the belief in an innate

their political situation as mothers.

This Article does not seek primarily to explain, in the tradition of criminology, why some mothers commit crimes against their children.²⁸ It is not confounding that some mothers fail to fulfill their maternal obligations. What is confounding is that so many women continue to be good mothers: women who continue to sacrifice their own lives' ends, spend their last dollar unselfishly on their children, live in desperation, and remain in violent homes because they refuse to give up being a mother. The astonishing aspect of many mothers' lives is the battle they fight for their children against sickness, poverty, war, and violence.²⁹ Society should celebrate and reward the mother's battle for her child, but women's essential nature cannot explain it. A woman mothers even when she longs for escape, even when she is seething at the unfairness, even when mothering does not seem natural. The importance of criminal law's definition of mother lies not only in the relatively few women it punishes, but also in the way most women internalize that meaning and conform to it.

This Article centers on the meaning of motherhood enforced by the criminal law's treatment of mothers who abuse or fail to protect their children.³⁰ Part I argues that the present institution of motherhood submerges women's selfhood and examines two aspects of criminal law that enforce mothers' selflessness—the sentencing of female lawbreakers and the punishment of mothers for failing to protect their children from abuse. By placing maternal failure in its political context—the violent power struggle within the home—this Article demonstrates that the criminal law

"womanhood" to which we must all adhere lest we be deemed either inferior or not "true" women.

Alcoff, *supra*, at 414; *see also* Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 *Stan. L. Rev.* 581, 602-05 (criticizing Robin West's view that women are essentially connected for implying that gender is more important to personal identity than race); Joan G. Williams, Deconstructing Gender, 87 *Mich. L. Rev.* 797, 807 (1989) (criticizing relational feminists, such as Carol Gilligan, for "[reclaiming] the compliments of Victorian gender ideology while rejecting its insults").

28. For a critique of criminology and its relevance to feminist thought, see Carol Smart, Feminist Approaches to Criminology or Postmodern Woman Meets Atavistic Man, in *Feminist Perspectives in Criminology* 70 (Lorraine Gelsthorpe & Allison Morris eds., 1990); *see also* William J. Chambliss, Toward a Radical Criminology, in *The Politics of Law* 230 (David Kairys ed., 1992) (discussing how analyses of the political and economic forces underlying criminalization have challenged traditional criminology). For reviews of classical and contemporary studies of female criminality, see Cesare Lombroso, *The Female Offender* (1980) (illustrating the classical biological explanation of female criminality); Ngaire Naffine, *Female Crime: The Construction of Women in Criminology* (1987); Smart, *supra* note 19, at 27-76; Dorie Klein, The Etiology of Female Crime: A Review of the Literature, 8 *Issues in Criminology* 3 (1973); Christine E. Rasche, The Female Offender as an Object of Criminological Research, 1 *Crim. Just. & Behav.* 301 (1974).

29. Rich, *supra* note 7, at 280.

30. For another approach to "bad mothers," see generally Ashe, *supra* note 2. Ashe calls for feminist legal theory to use contextualizing narratives of "bad mothering" as a method of critical inquiry. *Id.* at 1031-32; *cf.* Naffine, *supra* note 28, at 83 ("Criminologists interested in women have rarely approached their subjects for their account of their experience."). For an example of the use of narrative in studying female criminality, see Pat Carlen, *Criminal Women* (1985) (presenting autobiographical essays of four British female lawbreakers).

sometimes punishes mothers for their resistance against male control. Part II examines a second oppressive aspect of motherhood—patriarchy's use of children as hostages to secure women's obedience. This Part explains how child abuse inflicted by mothers relates to the contradictory role of children as the source of both mothers' vulnerability and their power. This Article considers the experience of Black mothers, who have viewed their homes as locations of oppression and resistance, to illustrate a complex political interpretation of motherhood. Finally, Part III proposes an approach to maternal crimes that describes a vision of a liberated motherhood by identifying with criminal mothers. This project entails the difficult task of distinguishing mothers' oppositional actions that are truly subversive and liberatory from those that subjugate children and reproduce the current social order.

I. THE SUPPRESSION OF WOMEN'S SELFHOOD

Since this Article does not claim that motherhood is inherently or totally oppressive, it attempts to identify injustices in motherhood's present configuration. This Article focuses on two problems. First, motherhood extinguishes women's individual identities, and second, motherhood leaves women vulnerable to patriarchal power because society and individual men hold their children hostage.³¹ Together, these aspects of motherhood constitute the essence of oppression—the denial of a person's ability to define herself and to determine the course of her own destiny.³²

A mother is a selfless creature. In the words of Adrienne Rich, "institutionalized motherhood demands of women maternal 'instinct' rather than intelligence, selflessness rather than self-realization, relation to others rather than the creation of self."³³ Because society defines women as caretakers of children, it subordinates women's personal needs and desires. It expects mothers to deny their own identities to fulfill the role prescribed by the state. Motherhood, as presently constituted, denies women's potential as full human beings.

Pregnancy unavoidably ties a woman's welfare to her fetus. Caring for young children necessarily entails some degree of self-sacrifice.³⁴ This

31. See West, *supra* note 12, at 140 (describing how motherhood leaves women vulnerable and nonautonomous).

32. See Paulo Freire, *Pedagogy of the Oppressed* 40-41, 73 (Myra B. Ramos trans., 1970) (defining oppression). The construction of mothers as self-sacrificing also excludes women from the mainstream liberal ideology based on autonomous individuals making self-interested choices. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. Rev. 1559, 1561 (1991).

33. Rich, *supra* note 7, at 42.

34. Some feminists have described producing a dependent and needy child as a terrifying act of self-annihilation. Robin West captured how a woman might view the prospect of becoming a mother as destroying her own individuation:

I fear having my ends "displaced" before I even formulate them. I fear that I will be refused the right to be an "I" who fears. I fear that my ends will not be my own. I fear that the phrase "my ends" will prove to be (or already is) oxymoronic. I fear I will never feel the freedom, or have the space, to become an ends-making creature.

connection need not mean self-destruction; society, not biology, determines the nature of this sacrifice and the degree to which motherhood annihilates a woman's individual identity. The criminal law reinforces the image of mother as a selfless being.

A. Sentencing and Women's Identity as Mothers

The criminal law's treatment of female offenders evidences society's image of all women as mothers or potential mothers, rather than individuated selves. A woman's role in the family determines the criminal sentence that a court will impose upon her.³⁵ Historical data indicating that women receive lighter sentences than men might seem to discount the claim that sexist ideology influences the criminal justice system. However, the enforcement of gender roles, rather than simple disparities in treatment, reflects patriarchal attitudes.³⁶ Courts often consider the effect of a woman's sentence on her family, especially her children, as more important

West, *supra* note 12, at 42; *see also* Mahoney, *supra* note 14, at 20 (recognizing that mothers are "uniquely bound to weighing the needs of others as their own. These needs have, in fact, become [theirs] in many significant ways—our [mothers'] 'selves' simply are not single.").

Helene Deutsch similarly describes women's widely-shared fear of childbearing in her classic analysis of the psychology of motherhood:

The psychologic difficulty that stands in the way of direct realization of motherhood can have various causes; their most frequent common denominator is woman's fear of losing her personality in favor of the child. This fear may manifest itself as primitive fear of death or as a concern over the threatened erotic values and physical beauty; it may derive from the fear of real obligations and restrictions through pregnancy, etc.; it is often an oppressive fear of the loss of professional and intellectual values or a feeling of insufficiency with regard to the great emotional demands of motherhood. All these and many other fears, often justified, are based upon the natural law that the old must yield to the new.

2 Helene Deutsch, *Psychology of Women, Motherhood* 47 (1945).

Both West and Deutsch present the loss of women's individuation at least partly as a natural, inevitable aspect of childbearing. *See id.* at 21-22 (describing the "psychologic world of motherhood"); West, *supra* note 12, at 140 (arguing that women's "biological, reproductive role" places women's lives at odds with the Kantian vision of human autonomy). Helene Deutsch explains that maternal instinct overcomes women's natural fear of motherhood: "The wisdom of nature has provided means for conquering [these fears]. [A woman's] love for her child is normally greater than her self-love, and the idea of eternity inherent in reproduction overcomes her fear of being destroyed. The future triumphs over the present, but only if the past is favorably [discarded]." Deutsch, *supra*, at 47.

Ironically, Alice Miller identifies the *child's* loss of self to gain the love of her narcissistic mother who experiences the child as part of herself as a source of childhood trauma. *See* Alice Miller, *The Drama of the Gifted Child* 3-48 (1981).

35. *See* Morris, *supra* note 1, at 92 (discussing studies that found that women's family role influences sentencing decisions); Kathleen Daly, *Structure and Practice of Familial-Based Justice in Criminal Court*, 21 *Law & Soc'y Rev.* 267 (1987) (discussing interviews of court officials, which reveal that the concern to protect family life structures the sanctioning process); Mary Eaton, *The Question of Bail: Magistrates' Responses to Applications for Bail on Behalf of Men and Women Defendants*, in *Gender, Crime and Justice*, *supra* note 1, at 95 (discussing a study of bail decisions in England and Wales, which found that courts rely on the social control of women inherent in the traditional family). *See generally* Nicolette Parisi, *Are Females Treated Differently?*, in *Judge Lawyer Victim Thief* 206 (Nicole H. Rafter & Elizabeth A. Stanko eds., 1982) (discussing various theories about the impact of gender on sentencing).

36. Eaton, *supra* note 35, at 95.

than its effect on the woman herself.³⁷

Sociologist Kathleen Daly theorizes that the treatment of offenders depends on two factors: (1) informal social controls that work in place of formal incarceration, and (2) the social costs created by incarceration.³⁸ Both factors result in what she calls "familial-based justice." Judges assume that defendants with family responsibilities have greater informal social controls in their lives. They are also reluctant to deprive children of a provider or caregiver.³⁹ Judges consider caretaking to be more indispensable than economic support to children's welfare.⁴⁰ Thus, while these considerations lead to the more lenient treatment of both male and female familial defendants, the mitigating effect of family is greater for women.⁴¹

37. Worrall, *supra* note 1, at 61; Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 *Gender & Soc'y* 9, 11 (1989); Daly, *supra* note 35, at 282-83; *see also* Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 *Fed. Sentencing Rep.* 194 (1990) (proposing a framework for addressing defendants' parental responsibilities at sentencing).

Of course, imprisonment typically *does* affect women more harshly than men because female offenders are more likely than male offenders to be the primary caretakers of small children. *See id.*; Terri L. Schupak, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 *Golden Gate U. L. Rev.* 455, 465-74 (1986).

Women often express both their reasons for committing crimes and their reasons for ceasing to commit crimes in terms of their relationship with their children. Eleanor Miller, *Street Woman* 125-26 (1986); Worrall, *supra* note 1, at 141. Ann Worrall found that some of the British female lawbreakers she studied committed crimes either to provide material goods for their children or to escape the chaos of domestic life. *Id.* at 141-43. Others complied with local authorities because they feared losing custody of their children. *Id.* at 144-46. Worrall concluded that their relationship with their children was the most important part of these women's lives and that their attitudes toward their children "were profoundly and inextricably bound up with their attitudes to their law-breaking." *Id.* at 141. Eleanor Miller discovered a similarly intense, but ambivalent, connection between mothering and the criminal activities of the female street hustlers she studied: "On the one hand, children are a moral force militating against involvement in street life, while, on the other, they are responsibilities that promote it and sometimes physical links to 'men' involved in it." Miller, *supra*, at 126.

38. Kathleen Daly, *Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment*, 66 *Soc. Forces* 152 (1987).

39. *See id.* at 156; *see also* Eaton, *supra* note 35, at 101-07 (demonstrating that British magistrates' bail decisions are based on female defendants' adherence to conventional roles within the family). A corollary to the belief that the family exerts informal social control over women is the myth that the emancipation of women from the traditional roles of wife and mother will lead to increased female criminality. *See* Clarice Feinman, *Sex Role Stereotypes and Justice for Women*, in *The Criminal Justice System and Women* 131 (Barbara R. Price & Natalie J. Sokoloff eds., 1982) [hereinafter *Criminal Justice System*]. For theories linking women's liberation and criminal behavior, *see generally* Freda Adler, *Sisters in Crime: The Rise of the New Female Criminal* (1975) (arguing that women's liberation has freed women to adopt masculine crime patterns); Rita J. Simon, *Women and Crime* (1975) (arguing that women's increased occupational opportunities caused an increase in property crime). A number of feminist criminologists have refuted Adler's and Simon's conclusions. *See, e.g.*, Morris, *supra* note 1, at 68-75; Naffine, *supra* note 28, at 89-104; Daly & Chesney-Lind, *supra* note 18, at 510-13; Carol Smart, *The New Female Offender: Reality or Myth?* in *Criminal Justice System*, *supra*, at 105.

40. Daly, *supra* note 38, at 168; *see* Daly, *supra* note 37, at 22-25 (describing judges' reasons for being lenient toward women).

41. Daly, *supra* note 38, at 163-64. The criminal justice system seems to sentence nonfamilial men and women with an even hand. *Id.* at 163. While a woman's role as caregiver

Courts, therefore, treat mothers more leniently than fathers.

Although society defines all mothers as selfless, societal concepts of race and class determine the meaning of maternal selflessness. Both the valuation of white middle-class mothers and the devaluation of others form the standard that measures a mother's selfishness. Scholars have noted the race- and class-based construction of maternal selflessness in child custody decisions. Adoption law, for example, generally assumes that the unwanted loss of a newborn harms mothers. However, it treats unmarried birth mothers as having no maternal instinct while penalizing those who consider keeping their babies.⁴² The law expects poor and minority mothers to selflessly permit the adoption of their children to give them a better life.⁴³ In Canadian child welfare cases, judges consider First Nation women selfish, and therefore bad mothers, for struggling to regain custody of their children from white middle-class foster homes.⁴⁴

Race and class accordingly interact with gender in determining mothers' sentences. Women who do not fit the norm of the ideal mother—single and divorced women, women with children in foster care, women of color, working class and poor women—require harsher treatment and are

may mitigate against incarceration, it does not prevent it. *See* Daly, *supra* note 35, at 284; *see also* Phyllis J. Baunach, You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation, *in* Criminal Justice System, *supra* note 39, at 168 n.1 (noting that between 56% and 68% of incarcerated women have dependent children 18 years or younger).

The Federal Sentencing Guidelines limit, but do not foreclose, sentencing judges' ability to take into account family responsibilities. *See* United States Sentencing Comm'n, Guidelines Manual § 5H1.6 (1992) (Policy Statement) ("Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."). The circuits are split on their interpretation of this provision. *Compare* United States v. Thomas, 930 F.2d 526 (7th Cir. 1991) (holding that extraordinary family circumstances may never justify a downward sentencing departure) *cert. denied*, 112 S. Ct. 171 (1991) and United States v. Cacho, 951 F.2d 308 (11th Cir. 1992) (holding that defendant's responsibility for raising four small children was not sufficiently extraordinary to warrant a downward departure) *with* United States v. Johnson, 964 F.2d 124 (2d Cir. 1992) (upholding district court's departure from the Guidelines based on defendant's sole responsibility for raising her own three children and her institutionalized daughter's child).

42. *See* Carmel Shalev, Birth Power: The Case for Surrogacy 41 (1989); *see also* Michelle Stanworth, Reproductive Technologies and the Deconstruction of Motherhood *in* Reproductive Technologies: Gender, Motherhood and Medicine 10, 15 (Michelle Stanworth ed., 1987) ("[S]ingle women, lesbian women (and disabled women) are expected to forego mothering in the interest of the child."); Sanger, *supra* note 2, at 28 (exploring the many ways in which the law regards women's rejection of mothering: "Some regulations prohibit decisions to separate (the case of surrogacy); others monitor them (adoptions); and still others require separation (the case of workfare).").

43. Ehrenreich, *supra* note 21, at 1369 n.103.

44. Kline, *supra* note 16, at 336-37. Kline uses the name "First Nation" to refer to the indigenous Canadian people. The expectation that surrogate mothers will abandon their children also reflects varying interpretations of maternal selflessness:

It is because of society's longstanding unwillingness to recognize the legitimacy of single and low-income women's claims to motherhood . . . that many find it so easy to assume that a contract birth mother should be able to give up her child without any difficulty. These women have never been seen as "true" mothers to begin with.

Ehrenreich, *supra* note 21, at 1378 n.34.

more dispensable.⁴⁵ Courts may assume that white middle-class mothers are both more amenable to nonjudicial social controls and more needed in the home by their children than other groups of mothers.⁴⁶

Because courts often consider Black women less fit to mother, they are more likely to confine Black women to custodial prisons.⁴⁷ This logic leads to racially disparate treatment of mothers which Nicole Rafter suggests may be an additional reason for the greater racial imbalance among female inmates than male prison populations which existed for many years.⁴⁸ Historically, smaller numbers of Black women have been imprisoned than either white or Black men, however, significantly greater *proportions* of incarcerated women were Black.⁴⁹ One explanation is judges' greater reluctance to incarcerate white female offenders than their Black counterparts.

Professor Daly also found that race affects how judges make family-based decisions.⁵⁰ Gender differences in the leniency accorded family ties was greatest for Black defendants.⁵¹ The mitigating effect of having children was stronger for Black women than for white women and weaker for Black men than for white men.⁵² Is there a way to reconcile the findings of Rafter and Daly? Rafter's work suggests that fewer Black women than white women receive lenient treatment from the criminal justice system because it is harder for them to meet the test of ideal motherhood and because the system expects them to give up mothering their children. Daly's work suggests that courts treat those fewer Black women who meet their

45. See Worrall, *supra* note 1, at 88.

46. See *infra* notes 62-63 and accompanying text.

47. See generally Roberts, *supra* note 10, at 1436-50 (tying the disproportionate prosecution of Black women for using drugs during pregnancy to white society's devaluation of Black motherhood).

48. See Nicole H. Rafter, *Partial Justice: Women, Prisons, and Social Control* 141-43 (2d ed. 1990).

49. *Id.* at 141. These statistics evidence the fact that Black female offenders not only suffer the disadvantages of race, they do not gain the same advantages of being female as white women. *Id.* at 143. In 1990, the percentage of female prisoners who were Black (approximately 47%) was about the same as the percentage of male prisoners who were Black. See Bureau of Justice Statistics, U.S. Dept. of Justice, *Correctional Populations in the United States, 1990*, 84-85 (1992) (tables 5.7 & 5.8).

50. See generally Kathleen Daly, *Neither Conflict Nor Labeling Nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender, and Family in Criminal Court Decisions*, 35 *Crime & Delinq.* 136 (1989).

51. Daly studied the interactive influences of race, ethnicity, gender and family in sentencing and pretrial release decisions for Black, white, and Hispanic men and women in New York City and Seattle criminal courts. Her findings confirmed the conclusions of her previous studies that gender differences in criminal justice decisions can be explained by defendants' familial relations. *Id.* at 152. Daly also found that the mitigating effect of having dependent children was strongest for Black women and weakest for Black men; "[t]herefore, gender differences in the leniency return for family ties or dependents are greatest for black defendants." *Id.* at 155.

52. Daly, *supra* note 38, at 155; see also Cassia Spohn et al., *The Effect of Race on Sentencing: A Re-Examination of An Unsettled Question*, 16 *Law & Soc. Rev.* 71, 72 n.4 (1981) (finding that courts treat Black females with significantly more lenience than Black males, but not with more lenience than white males).

expectations of good mothers in a way that drastically diverges from the majority of cases involving Black female and male offenders who are accorded neither the benefits of race nor gender.

B. *Women Who Commit Crimes as Mothers*

Although the law treats mothers who commit general crimes relatively leniently so that they may fulfill their traditional role, it treats women who commit crimes *as mothers* the harshest for violating the traditional role. The criminal justice system punishes female defendants according to the extent to which their acts deviate from appropriate female behavior.⁵³ Professor Daly found that familial women who committed crimes that made them "bad" mothers, such as sexual abuse of children or prostitution, did not receive the courts' mercy.⁵⁴ These women not only break the law, but by breaking the law they transgress their own female nature and their primary social identity as a mother or potential mother.

The law's interpretation of maternal crime depends on each criminal mother's social position. Anthropologist Anna Lowenhaupt Tsing conducted a study of twenty-five cases of women charged with endangering newborns during unassisted births.⁵⁵ Tsing found that courts viewed these mothers as different kinds of criminals, depending on their race and class. The courts treated young white college women leniently because the courts viewed them as innocent products of a distorted maturation process. On the other hand, the courts sentenced poor white women and women of color harshly because the courts perceived these crimes as obstinate and cunning refusals of obstetrical expertise.⁵⁶

For example, a state charged Donna Sloan, a nineteen-year-old white college student, with murder, felony child abuse, and concealing a death when she gave birth in a bathroom stall and wrapped the baby in toilet

53. Susan S. M. Edwards, *Women on Trial* 213 (1984); see Ellen H. Steury & Nancy Frank, *Gender Bias and Pretrial Release: More Pieces of the Puzzle*, 18 J. Crim. Just. 417, 418 (1990) (arguing that women earn "chivalry" in pretrial release decisions by conforming to sex-role expectations). Another example of the extra punishment of female deviance is the pattern of excessive intervention in the lives of delinquent girls for minor offenses, especially of a sexual nature. See Smart, *supra* note 19, at 132-40; Meda Chesney-Lind, *Judicial Enforcement of the Female Sex Role: The Family Court and the Female Delinquent*, 8 *Issues in Criminology* 5 (1973); David Webb, *More on Gender and Justice: Girl Offenders on Supervision*, 18 *Soc.* 367 (1984). Girls are more likely than boys to be brought into juvenile court for status offenses (acts not constituting crimes if committed by adults, such as running away), and their behavior is punished more severely than criminal offenses. Meda Chesney-Lind, *Guilty by Reason of Sex: Young Women and the Juvenile Justice System*, in *Criminal Justice System*, *supra* note 39, at 17. See generally Feinman, *supra* note 39, at 87.

54. Daly, *supra* note 35, at 285. Interviews of judges in Scotland revealed that they were more likely to imprison women who were deemed to have failed as mothers. As one judge explained: "If she's a good mother, we don't want to take her away. If she's not a good mother, it doesn't matter." Morris, *supra* note 1, at 92.

55. See Tsing, *supra* note 21, at 296. The cases Tsing discusses are not reported. Tsing's research included interviews with the defendants, legal and medical personnel, reporters, and community members; reviews of police reports, court files, newspaper articles; and reviews of psychiatric, medical, and probation records. *Id.* at 283.

56. *Id.* at 286.

tissue and placed it in a trash can after assuming it was dead.⁵⁷ The court characterized Sloan sympathetically at sentencing as young, confused, and in shock and pain during the delivery. It sentenced Sloan to four years probation and four hundred hours of community service.⁵⁸ Within a year of Donna Sloan's sentencing, the state charged Marlene Harris, a twenty-five-year-old white woman who worked for a temporary maid service, with murder and felony child abuse when she accidentally drowned her baby after she gave birth alone in a motel room.⁵⁹ According to the judge and prosecutor, Harris's refusal to seek medical assistance demonstrated that she was irresponsible, devious, and dangerous. The judge sentenced Harris to ten years in the penitentiary for the same offense Sloan committed.⁶⁰

The criminal law's interpretation of the severity of maternal crimes, like its interpretation of maternal selflessness, depends on race and class.⁶¹ Since middle-class white women fit society's notion of the ideal mother, criminal law more easily restores them to conforming motherhood. Courts treat white college women more leniently than other groups of mothers because they do not commit "irredeemable criminalities."⁶² Judges view their crimes as the result of mere misdirection. They believe that noncustodial therapy and education easily can rehabilitate these women.⁶³ Women of color and poor white women, on the other hand, do not fit the ideal of motherhood. Therefore, they are "identified not as educable products of defective maturation, but as outside of middle-class 'normal' values. They can be controlled but not changed."⁶⁴ Moreover, while judges consider the

57. *Id.* at 286-89. Sloan pled guilty to felony child abuse and concealing a death (a misdemeanor) in exchange for the state's dropping the murder charge. *Id.* at 288.

58. *Id.* at 289.

59. Tsing, *supra* note 21, at 291-94. Like Sloan, Harris pled guilty to felony child abuse. *Id.* at 291.

60. *Id.* at 291. Other women that courts have punished harshly include Sarah Berkeley, a white woman on welfare. A judge sentenced her to 20 years in prison for child endangerment and neglect when she delivered her baby in a toilet. Candace Smith, a Black woman on welfare, received a sentence of 25 years in prison for a similar offense. *Id.* at 295.

61. *See generally* Roberts, *supra* note 16 (discussing how racism and patriarchy interact in the social meaning of motherhood).

62. Tsing, *supra* note 21, at 291; *see also* Rickie Solinger, *Wake Up Little Susie: Single Pregnancy and Race before Roe v. Wade* (1992) (discussing how race determined society's view of unwed mothers in the years between World War II and *Roe v. Wade*). Solinger contrasts the attitudes and policies regarding white and Black single mothers in post-war America:

White women in this situation were defined as occupying a state of "shame," a condition that admitted rehabilitation and redemption White illegitimacy was generally not perceived as a "cultural" or racial defect, or as a public expense, so the stigma suffered by the white unwed mother was individual and familial.

Black women, illegitimately pregnant, were not shamed but simply blamed There was no redemption possible for these women, only the retribution of sterilization, harassment by welfare officials, and public policies that threatened to starve them.

Id. at 24-25.

63. Tsing, *supra* note 21, at 291.

64. *Id.* at 285; *see also* Regina Austin, *Sapphire Bound*, 1989 *Wis. L. Rev.* 539, 555 (arguing that the dominant society condemns Black unwed mothers because they deviate from

infant's death an isolated incident in the lives of middle-class white women, the same crime justifies the constant monitoring of the reproductive lives of poor white women and women of color.⁶⁵

C. Mothers Who Fail to Protect Their Children and the Context of Family Violence

The starkest example of criminal law's suppression of a mother's personal identity is the prosecution of women for failing to protect their children from another's abuse.⁶⁶ In 1991, a Tennessee jury convicted Denise Maupin of aiding and abetting the first degree murder of her

racist, sexist, and elitist norms); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 *Tenn. L. Rev.* 487 (1992) (discussing how race and class affect doctors' decisions to seek court-ordered medical treatment of pregnant women); Kline, *supra* note 16, at 340 (arguing that the dominant ideology of motherhood leaves First Nation women particularly vulnerable to being viewed by Canadian courts in child welfare cases as "bad mothers"); Roberts, *supra* note 10, at 1435-36 (arguing that criminalizing prenatal conduct punishes poor Black women for failing to meet the middle-class ideal of motherhood).

65. Tsing, *supra* note 21, at 295. A judge ordered Helen James, a twenty-eight-year old Black woman who delivered in a hospital toilet, to undergo mandatory pregnancy testing every six months for ten years. *Id.*; see also William Booth, *Judge Orders Birth Control Implant in Defendant*, *Wash. Post*, Jan. 5, 1991, at 1 (reporting case of a California judge who ordered Darlene Johnson, a Black mother who pled guilty to child abuse, to use Norplant for three years as a condition of probation). There has been considerable controversy regarding proposals to provide Norplant, a long-term contraceptive device approved by the Food and Drug Administration in December 1990, to female offenders, women on welfare, and sexually active teenaged girls. See William Booth, *Updating a Revolution: 5-Year Birth Control Implant Offers Reliability, but with Side Effects*, *Wash. Post*, Jan. 7, 1991, at A3; *For High School Girls, Norplant Debate Hits Home*, *N.Y. Times*, Mar. 7, 1993, S1 at 28; *Governor's Welfare Plan Pushes Free Birth Control*, *N.Y. Times*, Jan. 17, 1993, S1 at 27; William Grady & Erik Christianson, *Judge Says Birth Curb Order Holds*, *Chi. Trib.*, Apr. 30, 1993, *Chicagoland*, at 1. For discussions of the legality of imposing Norplant insertion as a condition of probation, see Stacie Arthur, *The Norplant Prescription: Birth Control, Women Control, or Crime Control?*, 40 *UCLA L. Rev.* 1 (1992); Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicians: The Impermissibility of Coerced Contraception*, 11 *St. Louis U. Pub. L. Rev.* 359 (1992); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 *Tul. L. Rev.* 1945, 1966-77 (1993).

66. Thirty-five states impose a statutory duty upon parents to care for and protect their children. See Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 *Law. & Ineq. J.* 359, 368 (1987). Criminal liability for failure to protect one's child can also be based on omission liability which allows the failure to perform a legal duty to take the place of a criminal act. See *supra* note 3. On the criminal punishment of child abuse within the last two centuries, see generally A. Schwartz & H. L. Hirsch, *Child Abuse and Neglect: A Survey of the Law*, in *Child Abuse* 32 (Amnon Carmi & Hanita Zamrin eds., 1984) [hereinafter *Child Abuse*]. Society's view of child abuse, like its view of motherhood, is historically constructed. See Linda Gordon, *Heroes of Their Own Lives* (1988) (examining the social construction of family violence during various historical periods between 1880 and 1960).

Cases holding mothers criminally liable for failing to protect their children from another's abuse fall into three categories:

- (1) [the] defendant [mother] was present when the abuse took place and did nothing to prevent the abuse, (2) [the] defendant [mother] left the child alone with the abuser, knowing that he had in the past abused the child, and (3) [the] defendant [mother] discovered the child in an abused state but failed to seek medical attention for the child.

Erickson, *supra* note 23, at 200.

two-year-old son, Michael.⁶⁷ The day her son died, Ms. Maupin left her two children at home in the care of her boyfriend, Thomas Hale, while she went to her first day of work at a local fast food restaurant.⁶⁸ When she returned home she found that Hale had beaten Michael until he was barely conscious for wetting his pants. Michael died that night in the hospital.⁶⁹ The court sentenced Denise Maupin to life imprisonment.⁷⁰

In 1992, the prosecutor in Kings County, New York, charged Mrs. G. with sexual abuse of her children, and, in the alternative, neglect for failing to protect them from their father's sexual abuse.⁷¹ The case came to the attention of the authorities when Mrs. G. went to the 68th police precinct for help after her husband violently assaulted her.⁷² After referral to the Victim Services Agency, she told a caseworker that her husband had been molesting the children, as well as beating her.⁷³ At trial, Mrs. G. testified that her husband would threaten her, punch and kick her, and bang her head against the wall for trying to intervene when he abused the children.⁷⁴ In 1987, Mrs. G. fled from her husband and moved in with her sister in Florida.⁷⁵ Not long afterwards, Mr. G. located his wife through a private detective. He harassed his wife and her sister until she returned to him in New York.⁷⁶ Two experts testified at the trial that Mrs. G. suffered from battered woman's syndrome, which deprived her of the ability to protect herself and her children.⁷⁷ Nevertheless, the judge entered a finding of neglect, imposing strict liability.⁷⁸

Courts hold mothers responsible for violence in the family.⁷⁹ Society

67. *Tennessee v. Maupin*, No. 272, 1991 Tenn. Crim. App. LEXIS 818, at *1 (Tenn. Crim. App. Oct. 7, 1991).

68. Ms. Maupin had previously sold her blood in order to survive with her children. *Id.* at *7.

69. *Id.* at *4.

70. The Court of Criminal Appeals reversed Maupin's conviction for first degree murder for lack of sufficient evidence, but remanded the case for a new trial on lesser offenses, including other degrees of homicide. *See id.* at *25.

71. *In re Glenn G.*, 587 N.Y.S.2d 464, 464 (Fam. Ct. 1992).

72. *Id.*

73. *Id.* at 465.

74. *Id.* at 468.

75. *Id.*

76. *Id.* at 468.

77. *Id.* at 469.

78. *Id.* at 470. For other cases in which a mother was convicted of failing to protect her child from another's abuse, see *Boone v. State*, 668 S.W.2d 17 (Ark. 1984) (affirming second-degree murder conviction of a mother for death of her four-year-old son based on circumstantial evidence that she exposed him to beatings by her boyfriend); *Palmer v. State*, 164 A.2d 467 (Md. 1960) (sustaining criminal negligence conviction of mother for permitting her boyfriend's prolonged beatings of her twenty-month-old daughter); *Commonwealth v. Howard*, 402 A.2d 674 (Pa. Super. Ct. 1979) (upholding involuntary manslaughter conviction of mother for failing to protect her daughter from her boyfriend's abuse).

79. *See Worrall*, *supra* note 1, at 119; Evan Stark & Anne H. Flincheraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 *Int'l J. Health Services* 97, 107 (1988). The government has no affirmative obligation to prevent child abuse. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 202 (1989) (holding that the Due Process

considers child abuse a failure of a mother's natural capacity to nurture and protect. Even though men are at least as likely as women to abuse children,⁸⁰ psychological theory and social service practice generally attribute child abuse to maternal deficiency.⁸¹ With respect to the failure of child abuse researchers to study the father's role, Judith Martin observes, "[T]he mother is not only expected to be most deeply and intimately concerned with child-rearing; she is also at fault should any mischance occur in that process. No matter who actually harms the child, mother has failed in her duty to create a safe environment for her young."⁸² The criminal law reflects this dominant social science view of a mother's responsibility for child abuse.

Overwhelming evidence of the connection between men's battering of women and the battering of children reveals that power relationships, rather than women's nature, are responsible for family violence. Women who fail to protect their children from violence are often victims of violence themselves.⁸³ Studies conducted in both the United States and Great

Clause does not require a state to protect a child from his parent's abuse). For a critique of *DeShaney*, see Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359, 1360 (1992) (arguing that the Thirteenth Amendment's prohibition of slavery imposes a government duty to protect children from abuse).

80. See Judith Martin, *Maternal and Paternal Abuse of Children: Theoretical and Research Perspectives*, in *The Dark Side of Families: Current Family Violence Research* 293, 293-94 (David Finkelhor et al., eds. 1983) [hereinafter *The Dark Side of Families*]; Stark & Flichtcraft, *supra* note 79, at 98. Studies show that men are the assailants in 25% to 55% of reported cases of child abuse. See *id.* at 99. The fact that children are as likely to be abused by their fathers as their mothers is striking in light of the grossly disproportionate amount of time children spend with their mothers. Moreover, it is undisputed that in families where a man is present, he is many times more likely than the mother to abuse the child. *Id.* Men also inflict the most serious injuries on children. *Id.*

81. See Martin, *supra* note 80. For a discussion of the psychological profession's tendency to blame mothers for children's developmental problems, see Barbara Ehrenreich & Deirdre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* 226-35 (1978); Paula J. Caplan & Ian Hall-McCorquodale, *The Scapegoating of Mothers: A Call for Change*, 55 Am. J. Orthopsychiatry 610 (1985); Paula J. Caplan & Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 Am. J. Orthopsychiatry 345 (1985); Catherine McBride-Chang et al., *Mother-Blaming, Psychology and the Law*, 1 S. Cal. Rev. L. & Women's Stud. 69 (1992). In her survey of literature on child abuse, Judith Martin found that only 2 of 76 articles focused on men. See Martin, *supra* note 80, at 295; see also Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 Harv. L. Rev. 727, 767 n.161 (1988) (noting that in 125 articles, no mother-child relationship was described as healthy and mothers were blamed for 72 types of psychological disorders in their children). On the powerful image of the "Bad Mother" in Western law, literature, and psychoanalytic theory, see Paula J. Caplan, *Don't Blame Mother: Mending the Mother-Daughter Relationship* (1989); Nancy J. Chodorow, *Feminism and Psychoanalytic Theory* 88-90 (1989); Ashe, *supra* note 2, at 1019-20.

82. Martin, *supra* note 80, at 300. For example, an article on domestic sexual abuse argued that "[t]he mother is pivotal in establishing the father-daughter incestuous bond." Ofra Avalon, *The Daughter as a Sexual Victim in the Family*, in *Child Abuse*, *supra* note 66, at 136. This researcher claimed that mothers not only passively condone their husband's abusive conduct, but also actively "promote the incestuous behavior by frustrating their husbands sexually." *Id.*

83. See Joseph P. Fried, *Queen Mother Pleads Guilty in Fatal Battering of a Boy*, 3 N.Y. Times, Jan. 24, 1991, at B2 (reporting that a mother who pled guilty to manslaughter in

Britain show that in most families in which the father batters the mother, the children are also battered.⁸⁴ Children whose mothers are battered are more than twice as likely to be battered than children whose mothers are not battered.⁸⁵ Furthermore, the woman's batterer is typically the one who is also beating the children.⁸⁶ Evan Stark and Anne H. Fritchcraft conclude from their numerous studies on this association that "child abuse in these relationships represents the extension of ongoing violence and is an intermediary point in an unfolding history of battering."⁸⁷

Courts, however, have not asked how this web of violence affects the mother's liability. They presume that a woman's obligation to her children always takes precedence over her own interest in independence and physical safety.⁸⁸ Feminists have criticized people who ask battered women

connection with the beating death of her son by her boyfriend had herself been beaten and intimidated); Robert D. McFadden, *Parents of Girl, 6, Charged With Murder After She Dies*, N.Y. Times, Nov. 6, 1987, at B3 (reporting the highly publicized arraignment of Hedda Nussbaum and Joel Steinberg for the murder of their illegally adopted daughter and Nussbaum's extensive injuries inflicted by Steinberg). *See generally* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1056-57 (1991) (discussing studies that show a correlation between violence against women and violence against children in families). On the prevalence of domestic violence against women, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2827-28 (1992) (quoting an AMA report stating that approximately four million women are severely assaulted by male partners annually); Lenore E. Walker, *The Battered Woman* 19 (1979) (estimating that 50% of all married women will experience domestic violence); Mahoney, *supra* note 14, at 10-11 & n.40 (accepting the 50% estimate).

84. Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in Feminist Perspectives on Wife Abuse* 158, 162 (Kersti Yllo & Michele Bograd eds., 1988); Lenore E. Walker, *The Battered Woman Syndrome* 59 (1984).

85. Evan Stark & Anne H. Fritchcraft, *Woman-Battering, Child Abuse and Social Heredity: What is the Relationship?*, in *Marital Violence* 147, 165-66 (Norman Johnson ed., 1985); Murray A. Straus et al., *Behind Closed Doors: Violence in the American Family* (1980). Children are also harmed by witnessing violence against their mothers. *See* Judith S. Wallerstein & Sandra Blakeslee, *Second Chances* 121 (1989) ("Children who witness violence between their parents . . . are no less victimized than children who are direct victims of abuse."); Gail S. Goodman & Mindy S. Rosenberg, *The Child Witness to Family Violence: Clinical and Legal Considerations, in Domestic Violence on Trial* 97, 99-104 (Daniel J. Sonkin ed., 1987) (describing the emotional effects on children of witnessing domestic violence). *See generally* Betsy McAlister et al., *Silent Victims: Children Who Witness Violence*, 269 JAMA 262 (1993) (citing studies indicating that children of battered women suffer a wide variety of medical, developmental, and psychological problems); Alan J. Tomkins et al., *Children Who Witness Woman Battering*, 14 Law & Pol'y 169 (1992) (describing the adverse psychosocial effects on children of witnessing battering and arguing that these children are neglected by child welfare services).

Stark and Fritchcraft, however, distinguish and refute the theory that abuse is transmitted intergenerationally (for example, that men beat their wives because they were abused as children). *See* Stark & Fritchcraft, *supra*, at 165 ("To the contrary, the stimulus to this history of deliberate injury and child abuse appears to be repeated assault by a male intimate, not a personal or familial inheritance of pathology.").

86. Bowker et al., *supra* note 84, at 158; Stark & Fritchcraft, *supra* note 79, at 107.

87. Stark & Fritchcraft, *supra* note 79, at 107.

88. *See id.* at 108. Laws making abortion a crime also reinforce the image of mothers as self-sacrificing. *See* Williams, *supra* note 32, at 1572-84 (discussing how the rhetoric of the abortion debate has largely revolved around the question of women's selfishness). *See generally* Faye Ginsburg, *Contested Lives: The Abortion Debate in an American Community* (1989)

"Why didn't you leave?" because this question fails to recognize the physical, social, and legal constraints that keep women in violent homes.⁸⁹ Courts slowly are beginning to acknowledge these constraints in self-defense cases.⁹⁰

These impediments do not seem to matter, however, when mothers have abused children.⁹¹ Judges assume that a woman's maternal instinct to protect her children from harm overcomes any barriers to escape.⁹² The law isolates each woman's maternal duties from other facets of her life, "requiring that pregnancy be a transcendent moment that can carry every

(discussing the meaning of abortion in American culture and politics). Judges have characterized the decision to abort as an act of selfishness, made for the woman's mere convenience and opposed to children's needs. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (arguing that the Court's holding in *Roe v. Wade* means that "the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus"). Many Americans appear to share this disapproval of abortion for "selfish" reasons: Most think abortion should be illegal if sought for the purpose of facilitating the woman's future career or enabling a teenager to finish school. Williams, *supra* note 32, at 1583 nn.138 & 140.

89. *See, e.g., Mahoney*, *supra* note 14, at 82; Ann Jones, *The Burning Bed and Man Slaughter*, 9 Women's Rts. L. Rep. 295, 296 (1986) (book review).

90. *See, e.g., State v. Williams*, 787 S.W.2d 308, 313 (Mo. Ct. App. 1990) (reversing conviction where trial judge excluded testimony on battered woman syndrome); *State v. Kelly*, 478 A.2d 364 (N.J. Super. Ct. App. Div. 1984) (allowing expert testimony on battered woman's syndrome to explain defendant's inability to leave despite constant beatings); *Commonwealth v. Stonehouse*, 555 A.2d 772, 784 (Pa. 1989) (allowing expert testimony to guide the jury in weighing other evidence "in light of how the reasonably prudent battered woman would have perceived and reacted to [the decedent's] behavior"); *State v. Allery*, 682 P.2d 312, 315 (Wash. 1984) (holding that testimony on battered woman's syndrome was admissible to show defendant's fear of imminent danger). *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 406-37 (1991) (analyzing opinions on appeal from battered women's homicide convictions); Cynthia L. Coffee, Note, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. Fam. L. 373 (1986-87). For the status of the admissibility of battered-woman syndrome testimony in the various states, see Maguigan, *supra*, at 461-63 (Table).

91. In child custody cases, as in criminal cases, courts deem violence against mothers as either irrelevant or trivial. *See Cahn*, *supra* note 83, at 1072. Courts often grant custody to abusive husbands on the theory that the past violence is unrelated to fitness as a parent. *See, e.g., Collinsworth v. O'Connell*, 508 So. 2d 744 (Fla. Dist. Ct. App. 1987) (affirming order granting father shared parental responsibility and increased visitation despite mother's testimony that he had beaten her and threatened to kill her); *In re Lutgen*, 532 N.E.2d 976 (Ill. App. Ct. 1988) (upholding custody award to man who had killed his wife) *appeal denied*, 537 N.E.2d 811 (1989). Naomi Cahn concludes, "[w]hen it comes to custody decisions, the law punishes and blames battered women for being battered." Cahn, *supra* note 83, at 1044.

92. Courts have even considered the mother's experience of battering to support a finding of guilt because it evidenced her knowledge of her husband's potential for violence. *See Phelps v. State*, 439 So. 2d 727 (Ala. Crim. App. 1983); *State v. Williams*, 670 P.2d 122 (N.M. Ct. App. 1983). In fact, a battered woman's decision about leaving is often governed more by concern for her children than by her assessment of personal harm. Mahoney, *supra* note 14, at 59 n.277. While most battered mothers remain in violent relationships until their children are past infancy, Mildred D. Pagelow, *Woman Battering: Victims and Their Experience* 142 (1981), they often leave when they believe that the violence also endangers their children. Mahoney, *supra* note 14, at 59.

woman outside the complexity of her particular history."⁹³ Motherhood subsumes a woman's identity as an individuated self.

One approach that takes women's individual situations into account argues that battered mothers are physically and emotionally incapable of controlling or escaping the violence in their homes.⁹⁴ This approach proposes that the law allow battered mothers charged with failing to protect their children to introduce expert testimony on battered woman's syndrome, as is now common in women's self-defense cases.⁹⁵ This is an important legal strategy because it forces the legal system to consider the real limits on a mother's ability to guard her children from harm. An alternative approach situates mothers' failure to protect their children in its political context. Rather than seeing battering as an excuse for mothers' failure to protect their children, we need to rethink the relationship between motherhood and family violence. Battering arises out of a struggle for power in the home—"the *batterer's quest for control* of the woman."⁹⁶ Battering is a response to women's struggle against male domination within the family. A man's inability to fulfill the patriarchal ideal of manhood by providing for his family or exercising authority in the home may lead him to attempt to restore his power through physical abuse.⁹⁷ Many men respond to women's attempts to resist male privilege in the home by violently subjugating both women and children.⁹⁸

93. Tsing, *supra* note 21, at 297; *see* Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 Vand. L. Rev. 1665, 1682-83 (1990) (criticizing the debate over assigning blame for family violence for neglecting larger systems of human interaction and social patterns).

94. *See generally* Erickson, *supra* note 23 (arguing that the beating of a mother should be a defense to the allegation that the mother permitted her child to be abused). Erickson found that attorneys representing mothers charged with failing to protect their children rarely used, in constructing a defense, evidence that the mother herself was beaten. *Id.* at 200.

At least two states provide an affirmative defense to a charge of permitting child abuse to defendants who reasonably feared that acting to prevent the abuse would risk greater harm to the child or to the defendant. *See* Iowa Code Ann. § 726.6.1e (West 1986); Minn. Stat. § 609.378(2) (1992). Judges, however, are reluctant to allow this defense because they believe women can take safer alternate courses, such as removing the child from the home or reporting the abuse. Johnson, *supra* note 66, at 367.

95. *See, e.g.*, Erickson, *supra* note 23, at 201 (suggesting that the law permit "a battered woman to bring in evidence that, by reason of her battered condition, she was unable to prevent the battering of her children, . . . particularly if expert witnesses were permitted to testify regarding the low self-esteem, 'learned helplessness,' and inability to flee the relationship that characterize the typical battered woman").

96. Mahoney, *supra* note 14, at 5. For an explanation of domestic violence as an issue of power, *see generally* Daniel J. Sonkin et al., The Male Batterer 37-39 (1985).

97. M. Patricia F. Kelly, Delicate Transactions: Gender, Home, and Employment among Hispanic Women, *in* Uncertain Terms, *supra* note 21, at 183, 190.

98. Stark & Flichteraft, *supra* note 79, at 108. Some men abuse the children in the home as a way of threatening the children's mother. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2826 (1992) (adopting district court's finding that "[i]n a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife"). Mary McGuire's husband taught her to be submissive by killing family pets. When she fled their home, he forced her back by holding a gun to her child's head. Ann Jones, Women Who Kill 298-99 (1980).

The typical pattern of assault suggests that male violence is not random, but "is directed at a woman's gender identity."⁹⁹ For example, Lenore Walker, a leading authority on battered women, discovered that her battered clients encountered increased violence when they became more assertive and began to make their own decisions.¹⁰⁰ Battering typically is evoked by struggles around gender issues, such as sex, housework, child care, the woman's employment outside the home, and her involvement in the family's finances.¹⁰¹ Batterers often justify their assaults with complaints about the woman's inadequate performance of household duties.¹⁰² A batterer's violence is his attempt to control the boundaries of the woman's role in the family.¹⁰³

D. Battered Mothers' Resistance in the Home

Martha Mahoney criticizes early studies which assumed that battered women hold "traditional" attitudes about women's social roles.¹⁰⁴ A researcher looking for traditionalism may mistake traditional activities, such as domestic work or bearing several children, as a reflection of the woman's attitude rather than the result of the man's attempt to control her.¹⁰⁵ Other studies have found, however, that battered women tend to share *less* traditional attitudes concerning the role women should play in the family, while battering men were likely to have *more* traditional attitudes.¹⁰⁶

Battering often particularly is directed at a woman's identity as mother. Many women report that family violence began or intensified when they became pregnant.¹⁰⁷ Some scholars theorize that the man's sense

99. Stark & Fitchcraft, *supra* note 79, at 100.

100. Walker, *supra* note 83, at 202. Mahoney makes this point by recounting a conversation between two women who had been beaten by their husbands: "R: They say we have this thing called 'learned helplessness' . . . Y: Really? I always thought it was when I was getting too much power." Mahoney, *supra* note 14, at 39. Lenore Walker uses the term "learned helplessness" to describe the socialization process experienced by a battered woman during which the batterer teaches her to believe that she is unable to escape his abuse. *See generally* Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 *Victimology* 525 (1977-78). Walker argues that learned helplessness explains why some battered women remain in violent relationships.

101. *See* R. Emerson Dobash & Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* 98-103 (1979).

102. *See* Lewis Okun, *Woman Abuse: Facts Replacing Myths* 69-70 (1986).

103. *See* Dobash & Dobash, *supra* note 101, at 48-96; Evan Stark & Anne Fitchcraft, *Violence Among Intimates: An Epidemiological Review*, *in* *Handbook of Family Violence* 293 (Vincent B. Van Hasselt ed., 1988).

104. Mahoney, *supra* note 14, at 54-55.

105. *Id.* at 54.

106. *Id.* at 55.

107. *See* Richard J. Gelles, *Family Violence* 130-31 (2d ed. 1987); Jean Giles-Sims, *Wife Battering: A Systems Theory Approach* 55 (1983) (listing pregnancy or the birth of a child as the second most common precipitator of violence); Walker, *supra* note 83, at 105-06.

The connection between male violence, pregnancy, and power has ancient roots. Jomo Kenyatta tells the Kenyan legend explaining the abrupt change in the Gikuyu tribe's kinship system from matriarchal to patriarchal. *See* Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* 8-9 (1965). It is said that Gikuyu men, indignant at women's superior position, planned a revolt. "But as the women were physically stronger than the men of that

of competition with the child for the woman's attention causes this intensified battering.¹⁰⁸ This Article suggests that battering pregnant women and new mothers is part of men's continued quest to enforce the woman's compliance with her role as mother. For example, men often batter their pregnant wives and girlfriends in an effort to coerce these women to carry the pregnancy to term.¹⁰⁹ Men may also batter their children in an effort to enforce the woman's maternal role. It seems likely that Thomas Hale murdered Denise Maupin's son at least partly in retaliation for Maupin going to work and leaving him with the chore of caring for the boy.¹¹⁰

If we understand child abuse as an extension of abuse experienced by their mothers, it is linked necessarily to women's resistance to their inferior status in the family. Male violence against children is often part of men's quest to control the mother and may intensify when the mother resists. When the criminal law punishes battered mothers for failing to fulfill their maternal role it may be punishing women's resistance. This view does not suggest that every failure-to-protect case involves a mother's opposition to male domination; some mothers simply do not care about their children and even maliciously participate in the abuse. Nor does this view suggest that the law should not protect children from harm. Children need protection because they are dependent on their parents for their well-being. Rather, this view calls for a political analysis of violence against children that explores whether their mothers resist conforming to oppressive family roles.

Two features of child abuse cases support the proposition that the criminal law punishes mothers' resistance. First, a mother's liability for another's abuse of her child sometimes depends on whether she is otherwise a good mother. In determining the mother's responsibility for child abuse, courts look at further evidence of bad mothering, such as not wanting children, leaving the children in the care of another to go to work, and keeping a messy house.¹¹¹

time, and also better fighters, it was decided that the best time for a successful revolt would be during the time when the majority of women, especially their leaders, were in pregnancy." *Id.* at 8. The men therefore seduced the women to have sexual intercourse in order to impregnate them. Several months later, taking advantage of the women's weakened physical condition, the men successfully wrested power from the pregnant women. I am grateful to Taunya Banks for reminding me of this legend.

108. See Walker, *supra* note 83, at 105-06.

109. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (striking the spousal notice requirement as an undue burden on married women seeking abortions). Thus, the Supreme Court recognized that "[f]or the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over the wife's decision [to terminate her pregnancy]." *Id.* at 2831.

110. See *supra* notes 68-70 and accompanying text.

111. See *Commonwealth v. Gallison*, 421 N.E.2d 757, 761 (Mass. 1981) (noting testimony at trial of mother convicted of manslaughter that her "apartment was cluttered and dirty, with empty cans, beer cans, and dishes on the kitchen table"); *supra* notes 21, 68-70; cf. Stark & Fletcher, *supra* note 79, at 107 (noting that the clinical response to violent families often centers on the mother's inability to fulfill her role, diagnosing the problem as "Mother needs support coping").

Second, courts treat mothers who appear pathetically weak or deranged more leniently than mothers who struggle to retain power in their homes.¹¹² In *State v. Scott*,¹¹³ for example, the court convicted Winifred and Marvin Scott of cruelty to a juvenile and sentenced them to five years at hard labor when their two-year-old son died from severe grease burns.¹¹⁴ The Scotts claimed that the injury was accidental and that they neglected to seek medical attention because they did not have enough money to pay for

Newspaper coverage of children killed by men in the home also tends to focus on the mother's neglect of her domestic duties. One newspaper article concerning a 24-year-old mother charged in the beating death of her daughter at the hands of the daughter's step-father concentrated on the mother's history of problems caring for her four children. See Jacques Steinberg, Records Show Mother's Neglect Preceded a 3-Year-Old's Death, N.Y. Times, Mar. 5, 1992, at B3. The article reported that city welfare workers removed her children from her home two years prior to the beating because she had left them unattended and because they were filthy and infected with lice and ringworms. *Id.* The article included a picture of the children's room littered with dirty clothes. See *id.*

In another front page article reporting the death of a 5-month-old baby due to burns inflicted by the mother's boyfriend, the New York Times devoted an entire page to exploring the cause of the tragedy. See Celia W. Dugger, Litany of Signals Overlooked in Child's Death, N.Y. Times, Dec. 29, 1992, at A1. Although the mother claimed that the boyfriend had beaten her and the baby, the article focused solely on the failure of city welfare workers to supervise the mother adequately. *Id.* It also appeared to blame the mother for raising her children in poverty: "Later in 1990, Ms. Harden and her children moved into a crumbling, drug-infested building in Harlem, where young men peddled crack and most of the tenants were, like herself, formerly homeless families from city shelters. It was there that her son would be fatally burned." *Id.* at B2.

112. Cf. Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work of Woman-Abuse, 67 N.Y.U. L. Rev. 520, 557 (1992) ("[W]omen have lost custody of their children because of their 'propensity for violence'—what in actuality was an aggressive show of self-defense."). Some feminist scholars have criticized the use of expert testimony on battered woman syndrome, particularly on "learned helplessness," in self-defense cases for perpetuating the stereotype that battered women are weak and even pathological. See, e.g., *People v. Torres*, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) ("Numbed by a dread of imminent aggression, these women are unable to think clearly about the means of escape from this abusive family existence."); Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23; Elizabeth M. Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women's Rts. L. Rep. 195, 207 (1986) ("[T]he term 'battered woman syndrome' has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting 'normally.'").

This view of women suffering from battered woman syndrome may have the perverse consequence of denying a defense to women who do try to protect themselves and their children from violence. See Phyllis Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 Harv. Women's L.J. 121, 144 (1985) ("[A] defendant may be considered a battered woman only if she never left her husband, never sought assistance, and never fought back."). The stereotype may also deny a defense to Black women who are battered. The dominant images of Black women as domineering, assertive, hostile, and immoral may make it difficult to fit Black women's acts of self-defense within current battered woman syndrome theory. See Sharon A. Allard, Rethinking Battered Woman Syndrome: A Black Feminist Perspective, 1 UCLA Women's L.J. 191 (1991); see also Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 206 (1989) (finding that courts are twice as likely to convict Black women of killing their abusive husbands as white women).

113. 400 So. 2d 627 (La. 1981).

114. *Id.* at 629.

burn treatment and transportation.¹¹⁵ The Louisiana Supreme Court reversed Winifred Scott's conviction because the trial judge refused to compel production of health department records showing that Winifred did not participate in making family decisions, that she had received mental health counseling, and that she was "incompetent, weak, depressed and subservient to her husband."¹¹⁶

The Pennsylvania Supreme Court adopted a drastically different view of maternal liability in *Commonwealth v. Cardwell*.¹¹⁷ The court affirmed Julia Cardwell's conviction for failing to protect her daughter Alicia from sexual abuse by Clyde Cardwell, her husband and Alicia's stepfather.¹¹⁸ Clyde abused Alicia for four years, beginning when Alicia was about eleven years old.¹¹⁹ Ten months passed between the time that Julia became aware of the danger to her child and the date Alicia finally ran away from home.¹²⁰

During those ten months, Julia took steps to try to escape with Alicia.¹²¹ Julia wrote two letters to Clyde, expressing her awareness of the abuse and her plan to leave him.¹²² She made an unsuccessful attempt to move to her mother's house, moving some of her and Alicia's clothing and applying for Alicia to transfer schools.¹²³ The destruction of her mother's

115. *Id.*

116. *Id.* at 629-30; *see also* *Johnson v. State*, 508 So. 2d 443, 446 (Fla. Dist. Ct. App. 1987) (Zehmer, J., dissenting) (stating that the especially harsh sentence for manslaughter imposed on a mother whose daughter was fatally beaten by the mother's boyfriend should be vacated because the mother "suffered from neurotic psychological needs stemming from a history of abuse in which she suffered, among other things, an emotional dependency on her codefendant boyfriend, who physically abused her, and, further, that her dependency on him permitted him to manipulate her without her being able to rectify the situation"). Prosecutors dropped manslaughter charges against Hedda Nussbaum, depicted as hunched over and totally subservient to Joel Steinberg's psychological spell, after she underwent months of intensive, residential therapy at a New York psychiatric hospital. *See* *People v. Steinberg*, 573 N.Y.S.2d 965 (App. Div. 1991), *aff'd*, 79 N.Y.2d 673 (1992). Nussbaum, a white book editor, also may have benefitted from the race- and class-based ideal of motherhood discussed in Part IB. *See* Alexis Jetter, *Mom Given 5-15 Years in Tot Death*, *Newsday*, Feb. 27, 1990, at 4 (contrasting dismissal of charges against Nussbaum with sentencing of a poor Hispanic mother who failed to protect her children from her boyfriend's abuse).

Similarly, some courts have accepted postpartum psychosis as an excuse or mitigation for infanticide. *See generally* Laura E. Reece, *Mothers Who Kill: Postpartum Disorder and Criminal Infanticide*, 38 UCLA L. Rev. 699 (1991); Anne D. Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 Hofstra L. Rev. 1133 (1990); Gail D. Cox, *Postpartum Defense: No Sure Thing*, Nat'l L.J., Dec. 5, 1988, at 3. Anna Tsing argues that women charged with killing their infants during an unassisted birth are treated more harshly than "psychotic" mothers who murder in passion because "the women's irresponsibility is associated with rationality, self-centeredness, and lack of emotional display." Tsing, *supra* note 21, at 297.

117. 515 A.2d 311, 312 (Pa. Super. Ct. 1986).

118. *See id.*

119. *Id.*

120. *Id.* at 315.

121. *Id.*

122. *Id.* at 316.

123. *Id.* at 315.

house by fire frustrated Julia's plan.¹²⁴

Clyde's violence, combined with the setbacks Julia encountered, might explain Julia's failure to act.¹²⁵ Alicia testified at the trial that she and her mother were afraid of Clyde. He had beaten Julia, smashed objects in the house, punched holes in the walls, and kept a pistol on the mantelpiece.¹²⁶ Violence often escalates and becomes potentially lethal when battered women attempt to leave the batterer.¹²⁷ Attempting to leave, therefore, may have been the most dangerous step Julia could have taken.

The Pennsylvania Supreme Court, however, did not consider whether Clyde's terrorization of Julia and Alicia mitigated Julia's criminal liability. Ironically, the court used Julia's efforts to challenge Clyde's abuse against her.¹²⁸ The court found that Julia owed her daughter a duty of care and protection, pointing out that Julia's letters to Clyde established her awareness of the abuse and its endangerment of her daughter's welfare.¹²⁹

Of course, Julia may have failed to leave Clyde because her desire to maintain a relationship with him superseded her concern for Alicia. Perhaps her accommodation to patriarchal ideals, rather than resistance to them, caused her maternal failure. It is impossible to explore these possibilities, however, unless the inquiry accounts for the mother's particular circumstances in failure to protect cases. Because a woman's compliance with an idealized maternal role primarily concerns courts in these cases, they neglect to examine the power struggle typically underlying family violence. The political focus this Article suggests enables courts to begin to recognize mothers' oppositional acts.

124. *Id.* at 313.

125. *Cf.* Mahoney, *supra* note 14, at 41 ("[T]he most socially situated description of learned helplessness describes it as a product of the interaction of frustrations women meet as they energetically pursue safety."). On battered women's efforts to seek help, see Edward W. Gondolf & Ellen R. Fisher, *Battered Women As Survivors: An Alternative to Treating Learned Helplessness* (1988).

126. *Cardwell*, 515 A.2d at 312-13.

127. Cynthia Gillespie, *Justifiable Homicide* 150-52 (1989). For a discussion of the violent pursuit of battered women who attempt to leave, see Mahoney, *supra* note 14, at 61-71. Mahoney uses the name "separation assault" to identify "the particular assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation." *Id.* at 5-6.

128. *Cardwell*, 515 A.2d at 315-16.

129. *Id.* at 316. In his concurring opinion, however, Judge Wieland noted the troublesome nature of Julia's unsuccessful efforts to protect her daughter:

It does not follow from the holding in this case that a parent will be made a criminal merely because he or she has been unsuccessful in preventing the abuse of a child by the parent's spouse. The criminal law should not be allowed to reach out in response to public outcry against child abuse and criminalize a parent who in good faith has attempted but has failed to confront successfully the terrible dilemma of being required to live in a family relationship with both an abused child and the abuser.

Id. at 317 (Wieland, J., concurring).

II. MOTHERS' VULNERABILITY

A. *Child Hostages*

1. *Child Hostages and Social Reproduction*

The second oppressive aspect of motherhood to consider is its relationship to women's vulnerability. Patriarchy takes children hostage, both literally and symbolically, to secure women's obedience. Concern for their children leads mothers to acquiesce in social institutions they would otherwise reject. Adrienne Rich referred to children as hostages in describing the way mothers train their children to conform to an unjust social order:

In attempting to give our children the security, the stability, we know they need, do we become more obedient to a social order we know is morally bankrupt; do we give in to the pressures of convention, of schools, of jobs; are our children our *hostages* to the State, its real safeguard—and escape-valve—against the anger of women?¹³⁰

Black mothers' concern for their children creates a unique vulnerability. Perhaps the hardest part of being a Black mother in America is reconciling the desire to ensure children's security with the temptation to succumb to society's mandates in establishing that security. Black mothers must teach their children to live in two cultures, both Black and white.¹³¹ Many Black mothers feel that they must cultivate in their children what W. E. B. Dubois described as a double consciousness: "Blacks have to guard their sense of blackness while accepting the rules of the game and cultural consciousness of the dominant white culture."¹³² A Black mother tries to pass on to her children her own cultural identity and to teach them to defy racist stereotypes and practices.¹³³

130. Adrienne Rich, *Motherhood: The Contemporary Emergency and the Quantum Leap*, in *On Lies, Secrets, and Silence* 259, 270 (1979) (emphasis added); see also Rich, *supra* note 7, at 61 (describing patriarchy's dependence on mothers as a conservative influence); cf. Williams, *supra* note 32, at 1622 (describing "[t]he major role children play in policing women back into domesticity").

131. Suzanne C. Carothers, *Catching Sense: Learning from Our Mothers to Be Black and Female*, in *Uncertain Terms*, *supra* note 21, at 232, 232. See generally Virginia H. Young, *A Black American Socialization Pattern*, 1 *Am. Ethnologist* 405 (1974) (describing child rearing practices among Black American families that teach both adaptation and a strong sense of an independent self).

132. W.E.B. Dubois, *The Gift of Black Folk: The Negroes in the Making of America* xii (1970).

133. A common theme of Black women's fiction involves the relationship between Black mothers and their daughters whom they raise to be independent, self-defined, and assertive. Collins, *supra* note 12, at 123-29; see Gloria Wade-Gayles, *The Truths of Our Mothers' Lives: Mother-Daughter Relationships in Black Women's Fiction*, 1 *Sage* 8, 12 (1984). Alice Walker, like other Black female writers, attributed her creativity to her mother. Mary H. Washington, *I Sign My Mother's Name*; Alice Walker, Dorothy West, Paule Marshall, in *Mothering the Mind: Twelve Studies of Writers and Their Silent Partners* 143, 145 (Ruth Perry & Martine W. Brownley eds., 1984).

At the same time they attempt to instill defiance and cultural identity, Black mothers must teach their children how to survive in a world that is hostile toward Black people and Black culture.¹³⁴ Teaching Black children to be defiant is difficult because being too defiant spells danger, if not death. George Jackson, the revolutionary prison leader, indicted Black mothers for this contradictory aspect of their mothering: "My mother at one time tried to make a coward of me. And so did every brother's mother I've ever drawn out. . . . [Each mother] attempted to aid [her son's] survival by discouraging his violence or by turning it inward."¹³⁵ Black children are the state's hostages, held for ransom that Black mothers must surrender in the form of submission to both patriarchal and racist standards. The task of raising our children curbs our own rebellion against sexist norms, but it also tempts us to restrain our children's rebellion against racism. Black mothers in this way help to perpetuate the present white-dominated, patriarchal system, even while resisting it, because we fear for our children.

2. *Child Hostages Who Prevent Mothers' Escape*

Patriarchy holds our children hostage not only at the metaphysical level of social reproduction, but also in concrete ways. The most powerful historical example of patriarchy's restraint of women by holding children hostage comes from slavery. American slaveowners used children as hostages to prevent slavewomen from running away or to lure escaped women back to the plantation.¹³⁶ One of the main reasons more African men than women escaped slavery was that children tied mothers to their masters.¹³⁷ Some slavewomen elected to take their children with them on

134. See Patricia H. Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, 4 *Sage* 3, 7 (1987) ("Black daughters must learn how to survive in interlocking structures of race, class and gender oppression while rejecting and transcending those very same structures.").

135. George Jackson, *Soledad Brother: The Prison Letters of George Jackson* (1970). See generally Joyce E. King & Carolyn A. Mitchell, *Black Mothers To Sons: Juxtaposing African-American Literature With Social Practice* (1990). Jackson's resentment of Black mothers' opposition to their sons' acceptance of the violent macho ideal of masculinity also may explain his indictment of Black mothers. See bell hooks, *Black Looks: Race and Representation* 98-99 (1992) (criticizing Jackson's "uncritical acceptance of patriarchal norms, especially the use of violence as a means of social control").

136. Gerda Lerner, *Black Women in White America* 15 (1972); Betty Wood, *Some Aspects of Female Resistance to Chattel Slavery in Low Country Georgia, 1763-1815*, 30 *Hist. J.* 603, 610 (1987); see Darlene Hine & Kate Wittenstein, *Female Slave Resistance: The Economics of Sex*, in *The Black Woman Cross-Culturally* 289, 295 (Filomina C. Steady ed., 1981) ("[S]lave children were sometimes used as pawns in a power struggle between plantation owners and their slaves. Owners used the sale or the threat of sale of slave children as a means for manipulating their recalcitrant or troublesome slaves."). Children generally restrain mothers' physical movement since children will not survive if they are abandoned and travel with children is difficult. Bakan, *supra* note 22, at 92.

137. Wood, *supra* note 136, at 609-10; see also Gerald Mullin, *Flight and Rebellion: Slave Resistance In Eighteenth Century Virginia* 40 (1972) (finding that 11% of eighteenth century advertisements for runaways in Virginia that specified gender were for women). On the other hand, the fact that slave children were more likely to stay with their mothers than their fathers (at least until they were sold to another master), forced fathers more often to run away to visit their children. Elizabeth Fox-Genovese, *Within The Plantation Household* 319-20 (1988) [hereinafter Fox-Genovese, *Plantation Household*]; see also Elizabeth Fox-Genovese, *Strategies*

the journey to freedom. Few willingly abandoned their children in order to increase the chances of their escape. Most of the female runaways publicized as sought after by slave masters in the Georgia Gazette between 1763-75 and 1783-95 reportedly took their children with them.¹³⁸ The Gazette reported that only one runaway, a slave woman named Hannah, abandoned one of her children.¹³⁹ The story quoted Hannah's owner as saying that, although she had taken her five-year-old daughter Lydia, "she had 'inhumanely' left 'a child at her breast.'"¹⁴⁰

Perhaps the best known Black mother who fled slavery was Harriet Jacobs. Her autobiography explains how her feelings for her children initially prevented her from escaping her master's sexual abuse:

I could have made my escape alone; but it was more for my helpless children than for myself that I longed for freedom. Though the boon would have been precious to me, above all price, I would not have taken it at the expense of leaving them in slavery. Every trial I endured, every sacrifice I made for their sakes, drew them closer to my heart, and gave me fresh courage . . .¹⁴¹

Harriet Jacobs's words reflect the paradox of motherhood: Her children both bound her to slavery and gave her the courage to resist it. Harriet eventually did escape without her children, spending seven years hiding in closets and crawl spaces.¹⁴² Years later, she purchased her children's freedom.¹⁴³

Today children still make escape difficult for mothers. Hostaged children affect the decision of many battered women who remain in violent relationships. A battered woman must weigh the benefits of leaving with

and Forms of Resistance: Focus on Slave Women in the United States, in *In Resistance: Studies in African, Caribbean, and Afro-American History* 143, 150 (Gary Y. Okhiro ed., 1986) [hereinafter Fox-Genovese, Focus on Slave Women] (suggesting that fewer women than men ran away because they had greater difficulty traveling unnoticed outside the plantation).

138. Wood, *supra* note 136, at 130.

139. *Id.* at 610 n.24.

140. *Id.* (quoting Ga. Gazette, Apr. 20, 1786). For an account of other slave women who escaped alone, see Fox-Genovese, Plantation Household, *supra* note 137, at 321-23 ("[M]any [slavewomen], however much they may have loved their men or their children, did not feel bound by conventional notions of domesticity and motherhood."). Elizabeth Fox-Genovese tells the story of Anna Baker, a slavemother, who fled the sexual abuse of overseers:

[W]hen I was too little to know anything 'bout it, her mother "run off an' lef' us." She did not remember much about her mother from that time, but after the war her mother returned to get them and explained why she had had to go. "It was 'count o' de Nigger overseers. . . . Dev kep' a-tryin' to mess 'roun' wid her an' she wouldn' have nothin' to do wid 'em." Once, when one of the overseers asked her to go to the woods with him, she said she would go ahead to find a nice place, and she "jus kep' a'go'in. She swum de river an' run away."

Id. at 323.

141. Linda Brent, Incidents in the Life of a Slave Girl 91-92 (L. Maria Child ed., 1973); *see also id.* at 96 (observing that her master "thought my children's being [on the plantation] would fetter me to the spot").

142. *See id.* at 97-160.

143. *See id.* at 207.

her children against the consequences her children will suffer on their departure. She must somehow balance her own safety against the harm to her children from inadequate housing, loss of economic security, and the absence of their father's companionship.¹⁴⁴ Her daily preoccupation with caring for her children under stressful circumstances may encumber her ability to assess her personal damage.¹⁴⁵

Most battered women do not want to leave a violent home without their children. Additionally, the law presents mothers with a special dilemma. Many shelters do not accept women with children, however, courts penalize women who do not take their children with them when they leave the batterer.¹⁴⁶ For example, one woman fled from her home and hid in the surrounding woods when her drunken husband was beating her. She decided to leave her three children in the house with her husband because he had never injured them before. A judge later granted custody of the children to her husband, holding her responsible for leaving them behind.¹⁴⁷

144. Mahoney, *supra* note 14, at 21-24. Mothers who oppose sharing custody with fathers are considered pathological. *See* Fineman, *supra* note 81, at 766.

145. Martha Mahoney describes how the sheer exhaustion from mothering may cause a battered woman to "blur the borders" of the terror she is willing to endure:

The blurring of borders, so frightening at the time, is in fact part of women's experience of motherhood and daily life—of her daily duty to lay aside her own needs for her children's. In many cases, the emotional changes of motherhood may combine with the pressures of violence to push women toward at least temporary compliance with a batterer's demands—while in the long run impelling her toward whatever choice (leaving, staying, seeking family or professional intervention) seems to best protect both herself and her children.

Mahoney, *supra* note 14, at 23.

146. Cahn, *supra* note 83, at 1092; Mahoney, *supra* note 14, at 46-47; Lenore E.A. Walker & Glenace E. Edwall, Domestic Violence and Determination of Visitation and Custody in Divorce, in *Domestic Violence on Trial*, *supra* note 85, at 127, 130-33 (Daniel J. Sonkin ed., 1987). Child welfare agencies also reinforce mothers' vulnerability by removing at-risk children of battered mothers more often than at-risk children whose mothers are not battered. Stark & Fitchcraft, *supra* note 79, at 106. This places women in a dilemma: "The woman cannot protect her child unless she is protected. But if she asks for protection for herself, her child may be removed." *Id.* at 111. Ironically, it may be safer for the mother to conceal the man's violence and stress her own inability to care for her child as a means of obtaining social service support. Thus, the woman's right to be a mother is made contingent on her "surpressing [sic] her own urge to self-development and survival." *Id.* at 112; *see also* Kline *supra* note 16, at 321-22 (arguing that Canadian courts' "tendency to characterize the subjection of First Nation women to violence by male partners as simply a 'personal problem' or a problem of 'lifestyle' . . . reinforces the placing of blame for child neglect on the deficiencies of individual mothers"); Mahoney, *supra* note 14, at 49 ("The needs of battered women in custody cases seem almost directly inverse to self-defense cases: . . . learned helplessness may 'explain' why a woman 'stayed' in the self-defense context, but may be interpreted as making her a poor model in childrearing and possibly a poor caregiver as well when custody is in question."); Ellen K. Thomas, Child Neglect Proceedings—A New Focus, 50 *Ind. L.J.* 60, 62 n.9 (1974) (stating that parents sometimes agree to a finding of neglect in order to obtain the help of psychiatrists and social workers). A mother may also delay reporting a man's abuse of her child because she fears the state will deprive her of custody. *See, e.g., State v. Cacchiotti*, 568 A.2d 1026, 1027 (R.I. 1990).

147. Walker & Edwall, *supra* note 146, at 131. Battered women also lose custody of their children because they temporarily separate from them in order to recompose their lives or

Patriarchy secures the compliance of mothers when it holds their children hostage by exacting its threats in diverse ways. The state holds poor and minority children hostage through child welfare agencies.¹⁴⁸ Malcolm X called foster care a modern system of legalized slavery.¹⁴⁹ The state's disruption of his own family reminded him of white slavemasters' control of slave families: "A Judge . . . in Lansing had authority over me and all of my brothers and sisters. We were 'state children,' court wards; he had the full say-so over us. A white man in charge of a black man's children!"¹⁵⁰ Social workers can also compel mothers' conformance to prescribed lifestyles and childrearing patterns by threatening mothers with termination of parental rights.¹⁵¹ The child welfare system is perhaps the most pervasive

because their children choose to live with their more financially and emotionally secure father. *Id.* at 132-33, 139. Moreover, mothers know that the father's abuse will probably not preclude him from receiving custody of the children. *See supra* note 91. For a discussion of the way social workers and therapists penalize battered mothers in custody matters, see Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, 27 *Judges J.* 8, 41-42 (1988); Mahoney, *supra* note 14, at 47-48.

148. On the disproportionate involvement of child welfare workers in Black families, see generally Andrew Billingsley & Jeanne M. Giovannoni, *Children of the Storm* (1972) (tracing the history of Black children in the American child welfare system); Sylvia S. Gray & Lynn M. Nybell, *Issues in African-American Family Preservation*, 69 *Child Welfare* 513 (1990) (discussing the cultural context in which the child welfare system operates); Patricia T. Hogan & Sau-Fong Sui, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 *Soc. Work* 493 (1988) (discussing past and present treatment of minority children in the child welfare system); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 *N.Y.U. Rev. L. & Soc. Change* 539 (1983-84) (criticizing the child welfare system's lack of respect for cultural differences in family situations); *cf.* Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 *Conn. L. Rev.* 955, 958-59 (1991) (distinguishing between "private" families that earn the right to government protection by living up to ideological expectations and "public" families that are subject to state supervision and control because they deviate from social norms).

149. Malcolm Little, *The Autobiography of Malcolm X* 21 (1965).

150. *Id.*

151. *Cf.* Miller, *supra* note 37, at 125 n.1 ("Probation and parole officers also use the children of female offenders as leverage in shaping their behavior."); Worrall, *supra* note 1, at 33 (describing the family as an agency of state-supervised reproduction in which the woman as mother is always the key site of intervention).

Men may take advantage of the government's supervision of poor mothers by threatening to report their wives or girlfriends if they do not comply with male demands. One batterer kept his girlfriend from ending their relationship by threatening to notify child welfare authorities about her drug use during pregnancy, which might have led them to remove her child. Telephone Interview with Susan Kraham, Family Law Unit, Essex-Newark Legal Services (Sept. 30, 1993).

Battered immigrant women often remain in violent homes because they believe that they need their husbands' cooperation in order to secure permanent residency. Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 *N.Y.U. L. Rev.* 520, 535 (1992). Joyce Phipps, a professor in the Seton Hall University School of Law Center for Social Justice, brought to my attention how these women's vulnerability is exacerbated by their fear that a judge will deport them without their children. Thus, battering husbands of immigrant women can hold their children hostage by threatening to seek custody of the children when the woman is deported.

Eleanor Miller found in her study of female street hustlers that former boyfriends and vice officers gained access to these women by pretending to have information about a sick or injured child. Miller, *supra* note 37, at 124-25. Miller tells the story of Loretta, a Black hustler

means of government supervision of poor and minority communities. In middle-class families, mothers' vulnerability is more likely to manifest in private child custody disputes. Divorcing husbands may use children as hostages to win reconciliation or concessions from their wives. Husbands may deliberately seize children to prevent their wives from leaving.¹⁵² The father's threat of a custody action is a powerful tactic to coerce the mother's compliance with his demand for lower support payments, a larger share of the marital property, or more convenient visitation arrangements.¹⁵³ Since many women view joint custody as "losing," while many men view it as "winning," divorcing women sometimes "bargain away needed property and support benefits to avoid the risk of 'losing' their children."¹⁵⁴

who went into hiding when she stabbed another woman during a fight. The police caught Loretta when she returned to her father's house to see her son after learning that he had sickle-cell anemia. *Id.* at 125.

152. Anna Demeter recounts her experience as a mother seeking divorce whose husband kidnapped her two youngest children and held them as hostages to force her back into the marriage. *See* Anna Demeter, *Legal Kidnapping* (1977); *see also* Adrienne Rich, *Husband-Right and Father-Right*, in *On Lies, Secrets, and Silence*, *supra* note 130, at 215 (written as the introduction to *Legal Kidnapping*).

As one anonymous mother said about custody battles, "Men think of children as the necessary chains to keep wives from flying away." Phyllis Chesler, *Mothers On Trial: The Battle For Children and Custody* 396 (1987) (quoting an anonymous source).

153. Lenore J. Weitzman, *The Divorce Revolution* 310-12 (1985); Becker, *supra* note 12, at 187. *See generally* Chesler, *supra* note 152. *But see* Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 160 (1992) (concluding that, "contrary to popular perception, most divorce decrees do not reflect a trade-off between custody and money issues" based on lack of any statistically significant relation between conflict over custody and level of support in study of California families). Fathers can make a credible threat of gaining custody of the children. Although judges award custody to mothers 90% of the time after divorce, the fathers' chances of obtaining custody in the few contested cases is better than even. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 *Wis. L. Rev.* 107, 120 & n.37; *see also* Becker, *supra* note 12, at 175-83 (1992) (discussing six common biases that operate against mothers in custody cases); Ellen Lewin, *Claims to Motherhood: Custody Disputes and Maternal Strategies*, in *Uncertain Terms*, *supra* note 21, at 199, 200 (listing reasons why women are at a disadvantage in custody litigation). *But see* Maccoby & Mnookin, *supra*, at 113 (finding that in 198 cases in California involving conflicting physical custody requests, mothers succeeded twice as often as fathers in securing their preferred arrangement). Maccoby and Mnookin also found, however, that fathers obtained joint or sole custody in 50% of cases involving high levels of legal conflict.

154. Fineman, *supra* note 81, at 761, *see also* Lewin, *supra* note 153, at 199 ("Even when they feel that they are 'good mothers,' women tend to capitulate to husbands' demands when custody becomes an issue."). Some mothers engage in "strategies of appeasement," including keeping a "low profile," abandoning claims to support and property, and making other compromises, to persuade fathers not to bring custody actions. *Id.* at 201-06. For example, Jean, a lesbian mother, sacrificed her share of the house and did not challenge her husband's refusal to contribute to the children's education or medical expenses for fear her husband would win custody of their two daughters:

He never brought it into the negotiations directly. But he would like call me and harass me, and by innuendo suggest that there were many issues that he *could* bring up if he wanted to . . . So basically, I traded my equity in the house for that issue not being raised at that time.

Id. at 204. For a discussion of the particular vulnerability of lesbian mothers in custody battles, *see generally* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *Buff. L. Rev.* 691 (1976).

There is a peculiar difficulty, then, in resisting the institution of motherhood. Resistance often harms children and may lead to the separation of mother and child.¹⁵⁵ The tremendously intense feelings most mothers develop towards their children, along with ideological and structural constraints, prevent mothers from rebelling. A mother may have to give in to patriarchal demands to keep her children. Mothers often must make the impossible choice between abandoning their children and accepting the status quo. Mothers usually try to endure for the sake of their children.

B. Mothers' Responses to Patriarchal Oppression

1. Women Who Strike at Their Children

A mother's abuse of her children relates to all mothers' peculiar vulnerability. By using children as hostages, society makes children the immediate source of mothers' subordination. If children are the chains that keep women from freedom, it is not surprising that mothers sometimes strike at those chains. Nor is it surprising that there is a remarkable connection between violence against women and their violence against their children. Studies show that battered mothers are much more likely to abuse their children than mothers who are not abused.¹⁵⁶ Women who beat their children participate in a profound contradiction: Children make them vulnerable, yet these children give them a degree of power.¹⁵⁷

While feminists now recognize violence against mothers as rooted in unequal power relationships in the family, they still speak of mothers'

155. See Rich, *supra* note 7, at 52 (noting that the oppressed laborer can hate his boss and dream of revolt, but a mother's situation is complicated by her emotional bond with her children); see also Becker, *supra* note 12, at 135 (arguing that the refusal to recognize the stronger emotional bond between mothers and their children ignores the pain caused by awarding custody to fathers). Fathers—even those who participate in childrearing—typically do not experience this intensity of bond with their children. *Id.* at 146-52. "As a result, most men walk away from their children at divorce with relative ease." *Id.* at 150-51; see also Maccoby & Mnookin, *supra* note 152, at 99-100 (finding that 82% of divorcing mothers wanted sole physical custody of their children, whereas equal proportions of divorcing fathers wanted joint custody, father custody, and mother custody, and fewer than 40% of fathers who stated a desire for joint or sole custody acted on it).

156. See Straus et al., *supra* note 85, at 216-17; Walker, *supra* note 83, at 60 (finding that women were eight times more likely to abuse their children when they were being battered than when they were not); Murray A. Straus, Ordinary Violence, Child Abuse, and Wife-Beating: What Do They Have in Common, *in* The Dark Side of Families, *supra* note 80, at 213, 229-30 (finding that mothers who were victims of severe violence had the highest rate of child abuse and even those subjected to "minor violence" had more than double the rate of child abuse as mothers who were not beaten); Jean Giles-Sims, A Longitudinal Study of Battered Children of Battered Wives, 34 Fam. Rel. 205, 207 (1985) (finding that 55.6% of the mothers in a battered women's shelter had used abusive tactics on their children, compared to a 3.8% national rate); see also Stark & Flitcraft, *supra* note 85, at 160 (noting that the single most common factor that households with abusive mothers share is battered mothers).

157. See Carolyn K. Washburne, A Feminist Analysis of Child Abuse and Neglect, *in* The Dark Side of Families, *supra* note 80, at 289, 291; see also Stark & Flitcraft, *supra* note 79, at 143 ("[I]t is her restriction to mothering, not its abandonment, that may lead the battered woman to violence against her child.").

relationship to their children in emotional terms. When mothers are kind to their children it is a result of their sweet, caring nature.¹⁵⁸ When they are cruel to their children it is a mad reaction to the strains of mothering.¹⁵⁹ If men's abuse of women and children is a defense of male privilege, is child abuse perpetrated by mothers an assertion of maternal "privilege" in the home?¹⁶⁰ Is it an attempt to control the little domain that mothers can claim as theirs *and* to destroy the apparent source of their vulnerability? Akhil Reed Amar and Daniel Widawsky perceive child abuse as a form of slavery.¹⁶¹ They argue that parental custody becomes child slavery in extreme cases of abuse when parents fail to treat their children as free persons with interests of their own.¹⁶² "Like the antebellum slave, an abused child is subject to near total domination and degradation by another person, and is treated more as a possession than as a person."¹⁶³ Thus, the abusive mother who directs her opposition to motherhood at her child negates her child as a person, with interests worthy of respect, in the same way that battery of women and the law's treatment of mothers negates the personhood of women.

A mother's abuse of her child is not perfectly analogous to a husband's abuse of his wife. Analyzing abuse in political terms requires that we recognize the difference in the positions of power occupied by men who batter women and mothers who batter their children. A battering mother is not equivalent to a battering man in a violent relationship.¹⁶⁴ The power

158. See generally Carol Gilligan, *In a Different Voice* (1982); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984).

159. Chodorow, *supra* note 81, at 85-87; see Rich, *supra* note 7, at 279.

160. See bell hooks, *Feminism: A Transformational Politic in Theoretical Perspectives on Sexual Difference* 185, 186 (Deborah L. Rhode ed., 1990) (observing that the parent-child relationship "centrally names women as agents of domination, as potential theoreticians and creators of a paradigm for social relationships wherein those groups of individuals designated as 'strong' exercise power both benevolently and coercively over those designated as 'weak'").

161. See generally Amar & Widawsky, *supra* note 79.

162. *Id.* at 1364.

163. Although child abuse shares with the enslavement of Africans these features of domination and subservience, there are critical limits to the analogy between an abusive mother and a white slavemaster. The mother, for example, lacks the unparalleled political power and the institutional support of her abuse enjoyed by white men in the antebellum South. The relationship between abusive mother and abused child is usually complicated by an emotional bond that was rarely present between white men and their slaves.

164. Nor is a battered child the equivalent of a battered woman. See Alice Miller, *Banished Knowledge: Facing Childhood Injuries* 75 (Leila Vennewitz trans., 1990). This need to clarify the power dynamics in violent relationships arises in the case of lesbian battering as well. The lesbian community has begun to confront violence in lesbian relationships and to question how it relates to patriarchal society. See generally *Naming the Violence: Speaking Out About Lesbian Battering* 173 (Kerry Lobel ed., 1986); Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 *Tex. J. Women & L.* 1 (1993); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 *Golden Gate U. L. Rev.* 567 (1990). Some lesbian scholars have pointed out that lesbian batterers, like battering men, are attempting to control their partners and manifest the cultural use of violence to gain power. See, e.g., *Confronting the Violence: A Manual for the Battered Women's Movement* (Pamela Elliott ed., 1990); Barbara Hart, *Lesbian Battering: An Examination*, in *Naming the Violence*, *supra*, at 174-75. There are features common to heterosexual and homosexual domestic violence. See Lee Evans & Shelley Bannister, *Lesbian Violence, Lesbian Victims: How to*

dynamic involved in all abusive relationships makes the analysis more complicated. A significant part of this analysis is that maternal child abuse may be at once a form of oppression and of opposition to the oppressive mothering role.

2. *The Privatized Nature of Mothers' Responses to Patriarchal Oppression*

A mother's response to her vulnerability is sometimes directed at her child. More often, mothers channel their frustration into self-destructive behavior, such as depression, addiction, and suicide.¹⁶⁵ Women usually respond to their inability to provide their children's needs with feelings of guilt at failing in their maternal responsibility.¹⁶⁶

Two societal features influencing each woman's experience of motherhood further their resort to self-destructive behavior and child abuse. First, mothering in nineteenth and twentieth century America has become an increasingly isolated experience.¹⁶⁷ Separate spheres ideology placed men in the public realm of work, politics, and culture, while confining women to the private realm of family and home.¹⁶⁸ The ideology and structure of childcare, which continues to place the full responsibility of

Identify Battering in Relationships, 4 *Lesbian Ethics* 52, 55-63 (1990). Despite these parallels, there remains a fundamental difference in social power between battering men and battering lesbians. The two phenomena cannot be understood simply by replacing the violent man with the violent lesbian in the analysis of domestic violence.

165. See Richard A. Cloward & Frances F. Piven, Hidden Protest: The Channeling of Female Innovation and Resistance, 4 *Signs* 651, 651-52 (1979). (asserting that female deviance is typically individualized and self-destructive); cf. Rich, *supra* note 7, at 267 (describing abortion, especially when self-induced, as a mother's act of violence against herself).

Even among battered women child abuse is relatively uncommon. See Stark & Flichtcraft, *supra* note 85, at 159-60. It appears that far more women than children are battered each year in the United States. *Id.* at 159 (stating that between 3 and 5 million women are battered each year in the United States as compared to between 50,000 to 200,000 children who are battered). *But see* Spencer Rich, Child Abuse Cases Total 2.4 Million, *Wash. Post*, June 27, 1990, at A6 (stating that 2.4 million child abuse cases were reported in 1989).

The self-destructive quality of women's deviance may partially explain why it is more often controlled by the mental health system than the criminal justice system. See Sally S. Simpson, Feminist Theory, Crime, and Justice, 27 *Criminology* 605, 617 n.8 (1989). See generally Phyllis Chesler, *Women and Madness* (1972). For a critique of the view of women's mental illness as a functional equivalent of crime, see Smart, *supra* note 19, at 149-75.

166. Rich, *supra* note 7, at 52; Worrall, *supra* note 1, at 63.

167. See Chodorow, *supra* note 7, at 5; Collins, *supra* note 12, at 64 (noting that Black mothers' communal childcare networks appear to be eroding); Johnson, *supra* note 2, at 13 (arguing the women's roles as wives separate mothers one from another); Rich, *supra* note 7, at 53; Ann Ferguson, On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach, *in* *Mothering*, *supra* note 2, at 153, 172-75 (describing the growing devaluation and isolation of mothers in the modern capitalist state).

168. See Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 *Colum. L. Rev.* 1118, 1118 (1986); Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 *Harv. L. Rev.* 1497, 1498-1501 (1983); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 *Women's Rts. L. Rep.* 175, 178 (1982). For a discussion of Black women's contradiction of separate spheres ideology, see *infra* notes 176-84 and accompanying text.

caring for children with mothers, inhibits their collective effort to transform motherhood.¹⁶⁹ Most women view the burdens of motherhood as their own private problem and, consequently, may not think of joining with other mothers to address maternal hardships. The physical seclusion of the mother-child relationship within individual homes compounds this conceptual difficulty. Moreover, women's conceptualization of family concerns as private discourages women from enlisting help from the state to improve the condition of their lives.¹⁷⁰

Second, the belief that the oppressive aspects of motherhood are biological, and therefore inevitable, inhibits a woman's criticism and opposition to the political source of her oppression. Richard Cloward and Frances Fox Piven, using examples of peasant rebellions in Europe and Southeast Asia, pointed out that historically whether hungry people rioted rather than passively endured hunger depended on their perception of the cause of food shortage.¹⁷¹ When people thought a shortage occurred due to natural disaster, they often endured their hunger.¹⁷² But when people thought the ruling-class caused or perpetuated the shortage, they rioted.¹⁷³ Similarly, women will more likely internalize their opposition to the expectations accompanying motherhood if they believe that nature is responsible for their condition rather than the actions of people in power.¹⁷⁴ The view that maternal selflessness is natural also leads women to see their own violence against their children as natural rather than an act of domination. It is important to recognize violence in the home as a question of power that enlists a mother's complicity in the subjugation of her children.

These two impediments do not prevent altogether women from resisting the current structure of motherhood. A mother's relationship to patriarchy is a complex interaction between her agency and the social structure and between her opposition to male domination and the accommodation of roles society demands her to fulfill. Linda Alcoff makes a similar point in explaining how a woman's identity depends on her position in society and yet is a product of her own reconstruction:

I assert that the very subjectivity (or subjective experience of being

169. Cloward & Piven, *supra* note 165, at 659-60 (contending that women's isolation in the traditional family system inhibits collective deviations); Rich, *supra* note 7, at 53 (noting that, unlike workers who can organize, mothers are divided from each other); Rich, *supra* note 130, at 270; *cf.* Kline, *supra* note 16, at 319-22 (describing how the individuation of mothers and the practice of mothering obscures the roles colonialism and racism play in the lives of Canadian First Nation mothers).

170. *See* Olsen, *supra* note 168, at 1542; *cf.* Evan Stark & Anne Flitcraft, *Social Knowledge, Social Policy, and the Abuse of Women: The Case Against Patriarchal Benevolence*, in *The Dark Side of Families*, *supra* note 80, at 330, 345 (explaining how the American social science conception of family violence is influenced by "the need to identify the family as a distinct sphere of private life where social problems originate").

171. *See* Cloward & Piven, *supra* note 165, at 662-63.

172. *Id.* at 662.

173. *Id.*

174. *Cf.* *id.* at 663 (contending that women endure rather than deviate because of the psychological ideology of women's nature).

a woman) and the very identity of women is constituted by women's position. However, this view should not imply that the concept of "woman" is determined solely by external elements and that woman herself is merely a passive recipient of an identity created by these forces. Rather, she herself is part of the historicized, fluid movement, and she therefore actively contributes to the context within which her position can be delineated.¹⁷⁵

The patriarchal structure of motherhood contributes to abuse perpetrated by the mother. Society reinforces mothers' privatized responses to their vulnerability by viewing motherhood's burdens as natural or private problems. A political analysis of maternal child abuse recognizes that a mother's crime may be at once an act of domination and an act of opposition to a subordinating role. Understanding how mothers' crimes originate in family power struggles, rather than in nature or stress, may help us to redirect mothers' opposition away from oppressive and self-destructive acts toward more liberating forms of resistance.

C. Black Mothers' Insight: Families as Locations of Oppression and Resistance

The experience of Black mothers suggests a more complex political interpretation of motherhood because history indicates that they have viewed their homes as complicated locations of both oppression and resistance. Black mothers contradict the separate spheres ideology expressed both in the traditional division of male work and female domesticity, and in the feminist conception of the private realm as the locus of women's subordination.

First, the dominant societal conception of family life that opposes motherhood versus wage labor has never described Black women's lives. Separate spheres ideology dictates that men sustain the family economically and represent it in the public sphere, while women care for the private realm of children and the home.¹⁷⁶ Black women, however, traditionally have mothered while working.¹⁷⁷ Black women raised their children when they worked in the field during slavery and, after Emancipation, many

175. Alcoff, *supra* note 27, at 434; *see* Collins, *supra* note 12, at 91-114 (describing Black women's self-definition); Natalie Z. Davis, *Boundaries and Sense of Self in Sixteenth-Century France*, in *Reconstructing Individualism* 53 (Thomas Heller et al. eds., 1986) (discussing how women created a sense of self within the constraints of patriarchal family units); *see also* Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: A Critical Analysis*, 53 *Harv. Educ. Rev.* 257, 261 (1983) (discussing the dualism between agency and structure: "Subordinate cultures, whether working-class or otherwise, partake of moments of self-production as well as reproduction; they are contradictory in nature and bear the marks of both resistance and reproduction"); Williams, *supra* note 27, at 1613-15 (discussing the false dichotomy between women's free choice and false consciousness in the context of motherhood and work since "every decision is a situated one, reflecting both constraints and the exercise of personal control").

176. *See supra* text accompanying note 168.

177. *See generally* Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family from Slavery to the Present* (1985).

continued to raise their children while earning a living outside the home.¹⁷⁸ Patricia Hill Collins believes that this aspect of Black motherhood is as much a product of self-definition as racial oppression.¹⁷⁹ She argues that West African tradition explains many of the features of Black mothering that confound the Eurocentric ideal of mother.¹⁸⁰

Second, Black women's history of working in a racist world also complicates the feminist interpretation of the family as an institution of violence and subordination.¹⁸¹ Historically, Black women have viewed work outside the home as an aspect of racial subordination and the family as a site of solace and resistance against white oppression.¹⁸² Black women's attention to domestic duties within their own home has defied the expectation of total service to whites.¹⁸³ Black women's housework and care for family members directly benefited Black people, rather than white masters and employers. Angela Davis observed that "slavewomen perform[ed] the only labor of the slave community which could not be directly and immediately claimed by the oppressor."¹⁸⁴

Moreover, the immediate concern of many Black mothers is just as likely to be state encroachments on their autonomy as domestic abuse of power. State-coerced sterilization and the prosecution of women who use

178. *Id.*; Barbara Omolade, *The Unbroken Circle: A Historical Study of Black Single Mothers and Their Families*, 3 *Wis. Women's L.J.* 239, 252 (1987).

179. Collins, *supra* note 134, at 4 (describing an Afrocentric ideology of motherhood). Patricia Hill Collins identifies four enduring themes of an Afrocentric ideology of motherhood: the importance of "othermothers," women who assist biological mothers by sharing mothering responsibilities; mothers' provision of the economic resources essential to family well-being; the view of motherhood as a foundation for social activism; and motherhood as a symbol of power. *Id.* at 4-6.

180. *Id.* at 4 ("Mothering was not a privatized nurturing 'occupation' reserved for biological mothers, and the economic support of children was not the exclusive responsibility of men. . . . Instead, for African women, emotional care for children and providing for their physical survival were interwoven as interdependent, complementary dimensions of motherhood."); see Carothers, *supra* note 131, at 243 (observing that Black women in her study viewed their mothers as complex beings, rather than as persons without further identity).

181. See Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *Abortion: Moral and Legal Perspectives* 45, 53 (Jay L. Garfield & Patricia Hennessey eds., 1984) (describing the private sphere as "the place of battery, marital rape, and women's exploited labor . . . whereby women are *deprived* of identity, autonomy, control and self-definition").

182. See generally bell hooks, *Feminist Theory: From Margin to Center* 133-34 (1984); Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 132 (1988) (noting that the mother-housewife role does not have the same meaning for Black and white women).

183. See generally Angela Y. Davis, *Women, Race, and Class* 17 (1981); Jacqueline Jones, "My Mother Was Much of a Woman": Black Women, Work, and the Family Under Slavery, 8 *Feminist Stud.* 235, 237 (1982); cf. Kelly, *supra* note 97, at 192 (reporting a Cuban woman's reflections on work outside the home: "It is foolish to give up your place as a mother and a wife only to take orders from men who aren't even part of your family. What's so liberated about that?").

184. Angela Davis, *The Black Woman's Role in the Community of Slaves*, 3 *Black Scholar* 2, 7 (1972); see Spelman, *supra* note 182, at 123 (observing that the oppressive nature of the "housewife" role must be understood in relation to women's other roles, which are based on race as well as gender: "The work of mate/mother/nurturer has a different meaning depending on whether it is contrasted to work that has high social value and ensures economic independence or to labor that is forced, degrading, and unpaid.").

drugs during pregnancy are examples of state intervention that pose a much greater threat for Black women than for white women.¹⁸⁵ With regard to child custody, the primary concern of white middle-class women is private custody battles upon divorce.¹⁸⁶ For most women of color, the dominant threat is the state's termination of their parental rights. The emancipatory meaning of Black domesticity does not minimize the exploitative aspects of Black women's labor in their homes or negate the existence of domestic violence against Black women and children.¹⁸⁷ It suggests, however, a political interpretation of the home that espouses the possibility of a liberated motherhood.

Black women's tradition of recognizing motherhood as a potentially radical vocation bears closer examination. First, Black women historically have experienced motherhood as an empowering denial of the dominant society's denigration of their humanity.¹⁸⁸ Bearing and nurturing Black children ensure the life of the Black community. Bearing and nurturing Black children counteract a racist society's power to kill Black children through poverty, malnutrition, inadequate health care, and unsafe housing.¹⁸⁹ Bearing and nurturing Black children defy the dehumanizing message that Black people do not deserve to procreate.¹⁹⁰

Second, Black women historically have practiced mothering in a way that overcomes some of the burdens of motherhood and holds the potential for the collective transformative action of mothers. Historically, Black women have not mothered their children in isolation, nor does the Black community confine the act of mothering to birth mothers. Black women share a rich tradition of women-centered, communal childcare.¹⁹¹ These

185. Roberts, *supra* note 10, at 1471.

186. Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 *Harv. Women's L.J.* 115, 129 (1989).

187. See Collins, *supra* note 12, at 44 (suggesting the need for further exploration of "families as contradictory locations that simultaneously confine yet allow Black women to develop cultures of resistance").

188. *Id.* at 137.

189. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 77 (1991) (Table 111) (showing that in 1987 the Black infant mortality rate was 17.9 deaths per thousand births, compared to 8.6 deaths for white infants).

190. See Roberts, *supra* note 10, at 1472. Alice Walker's description of her relationship with her child suggests a political solidarity:

It is not my child who tells me: I have no femaleness white women must affirm. Not my child who says: I have no rights black men must respect. It is not my child who has purged my face from history and herstory, and left mystery just that, a mystery; my child loves my face and would have it on every page, if she could, as I have loved my parents' faces above all others. . . . We are together, my child and I. Mother and child, yes, but *sisters* really, against whatever denied us all that we are.

Alice Walker, *One Child of One's Own: A Meaningful Digression within the Work(s)*, Ms., Aug. 1979, at 47, 75.

191. See generally Collins, *supra* note 12, at 119-23; Carothers, *supra* note 131, at 234; Collins, *supra* note 134, at 5. On childrearing patterns in the Black community, see generally Joyce Aschenbrenner, *Lifelines: Black Families in Chicago* (1975); Robert Hill, *Informal Adoption Among Black Families* (1977); Elmer F. Martin & Joanne M. Martin, *The Black Extended Family* (1978); Carol B. Stack, *All Our Kin: Strategies for Survival in a Black*

cooperative networks include members of the extended family (grandmothers, sisters, aunts, and cousins) as well as nonblood kin and neighbors. Patricia Hill Collins uses the term "othermothers" to describe the women who help biological mothers by sharing mothering responsibilities.¹⁹² The relationship between othermothers and children ranges from daily assistance to long-term care or informal adoption.¹⁹³ Relying on other women to share the burdens of motherhood is a potentially radical alternative to the harmful responses of child abuse and self-isolation.¹⁹⁴

Third, Black women have recognized that children can give women the motivation, courage, and insight to resist oppression.¹⁹⁵ Concern for children has often served as the foundation for formal collective struggles among Black women, such as the Sisterhood of Black Single Mothers in Brooklyn and the Welfare Mothers' Movement.¹⁹⁶ It may be that the experience of communal mothering leads some Black women to become community activists in order to make a better life for the entire community's children.¹⁹⁷

Black women often mother for political ends. Karen Brodtkin Sacks, for example, found that the Black women involved in a union organizing drive at a local medical center brought family events into the workplace to create unity among workers. These women used familistic skills and shared

Community (1975).

192. Collins, *supra* note 134, at 5.

193. Collins, *supra* note 12, at 120.

194. Shared responsibility for child care also rejects the Western conception of children as property of their parents. hooks, *supra* note 182, at 144. See generally Barbara B. Woodhouse, "Who Owns the Child?: Meyer and Pierce and The Child as Property, 33 Wm. & Mary L. Rev. 995, 1041-50 (1992) (describing a property model of parenthood that denies children a voice and membership in the community).

195. Collins, *supra* note 134, at 4 ("[T]he experience of motherhood can provide Black women with a base of self-actualization, status in the Black community, and a reason for social activism."); cf. Martha Minow, Rights for the Next Generation: A Feminist Approach to Children's Rights, 9 Harv. Women's L.J. 1, 3 (1986) (asserting that women have historically been the leading advocates for children and that women's struggle for liberation has always been tied to political struggles on behalf of children). Black women often explain their involvement in social activism as an outgrowth of their experiences as mothers. The story of one community activist in Cheryl Townsend Gilkes's study of Black women and community work was typical:

I guess it was really through my children and through the schools [that I got involved]. Well, even when my children were going to nursery school [sic] I just always felt it was important for me to be involved and would do whatever I could do with mothers' groups. I lived in the projects with the mothers' group down there and when we moved up here, I joined a couple neighborhood associations and got fairly involved.

Cheryl T. Gilkes, "Holding Back the Ocean with a Broom": Black Women and Community Work, in *The Black Woman* 217, 219 (La Frances Rodgers-Rose ed., 1980).

196. See Rich, *supra* note 130, at 270.

197. Collins, *supra* note 134, at 5-6; Gilkes, *supra* note 195, at 227; Karen B. Sacks, Gender and Grassroots Leadership, in *Women and the Politics of Empowerment* 77 (Ann Bookman & Sandra Morgen eds., 1988) [hereinafter *Politics of Empowerment*] (discussing Black female workers' involvement in a hospital union organizing drive and arguing that their family commitments fostered their activism in the workplace).

a family idiom to conceptualize relationships with their co-workers.¹⁹⁸ The Black women at the medical facility were able to take on key organizing roles because of the skills they acquired in playing a central role in their families—"keeping people together, ensuring that obligations are fulfilled, and acting to express the group consensus."¹⁹⁹ The political activism of Black mothers invites a feminist revision of the relationship between work, family, and political action.²⁰⁰ Motherhood for many Black women, far from hindering Black women's political activism, has actually fostered their political activism.

Finally, the history of Black mothers provides examples of maternal crimes that were acts of resistance. Slavewomen committed what the state considered crimes against their children in an attempt to defy their masters' exploitation of their sexuality and reproduction.²⁰¹ Some refused to bear children by abstaining from sexual intercourse and by using contraceptives and abortives.²⁰² Others committed infanticide.²⁰³ A. Leon Higginbotham, Jr., tells the story of Jane, a Missouri slave convicted of murdering her infant child, Angeline, in 1831.²⁰⁴ Judge Higginbotham asks two important questions about this case. First, he questions Missouri's purpose in convict-

198. Sacks, *supra* note 197, at 80-87.

199. *Id.* at 90. Black mothers' dependence on a network for childcare also provides a model for political organizing. See Cheryl T. Gilkes, Building in Many Places: Multiple Commitments and Ideologies in Black Women's Community Work, in *Politics of Empowerment*, *supra* note 195, at 53, 74.

200. See Sacks, *supra* note 197, at 93.

201. Hine & Wittenstein, *supra* note 136, at 296 ("The female slave, through her sexual resistance, attacked the very assumptions upon which the slave order was constructed and maintained.").

202. See Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 46 (1984); Deborah G. White, Ar'n't I a Woman? Female Slaves in the Plantation South 85 (1985); Hine & Wittenstein, *supra* note 136, at 292-93.

203. Hine & Wittenstein, *supra* note 136, at 294-95. It appears that slavemothers killed their own children more often than their masters' children. A. Leon Higginbotham, Jr. & Anne F. Jacobs, The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 1042 (1992). We do not know, however, how many slavemothers committed infanticide, in part because they were often falsely accused of smothering their infants while they slept. See Michael P. Johnson, Smothered Slave Infants: Were Slave Mothers at Fault?, 47 J.S. Hist. 493, 493 (1981) (describing how census mortality schedules for southern states attributed the high rate of slave infant death to accidental suffocation by the mother); Todd L. Savitt, Smothering and Overlaying of Virginia Slave Children: A Suggested Explanation, 49 Bull. Hist. Med. 400, 400 (1975) (identifying the true cause of suffocation deaths of slave children as Sudden Infant Death Syndrome).

204. She was charged with "knowingly, willfully, feloniously and of her malice aforethought" mixing a "certain deadly poison" and giving it to her infant child to drink on December eighth and ninth. The indictment alleged that on December eleventh, so "that she might more speedily kill and murder said Angeline" with "malice aforethought," she wrapped and covered Angeline in bed clothes and then "choked, suffocated and smothered" her, and that, as a result of the poisoning and the smothering, the infant died.

A. Leon Higginbotham, Jr., Race, Sex, Education, and Missouri Jurisprudence: Shelley v. Kraemer in Historical Perspective, 67 Wash. U. L.Q. 673, 694-95 (1989) (citing Jane (a slave) v. The State, 3 Mo. 45 (1831)).

ing Jane for the murder.²⁰⁵ Slavery's dehumanization of Black children leaves little doubt that courts prosecuted slavemothers in order to protect the state's financial interest in the children, not the welfare of the children.²⁰⁶ Second, Judge Higginbotham questions Jane's purpose in killing her daughter.²⁰⁷ He presumes that the mother's motivation was to protect her child from slavery's cruelty and that her homicidal act may have actually been an effort to fulfill her maternal duty of care. We need not condone the slavemother's act to understand that it arose from a desire to spare, rather than harm, her child.

Judge Higginbotham does not ask the more troublesome question: What if Jane sacrificed her child as an act of defiance, one small step in bringing about slavery's demise? This possibility raises difficult moral as well as factual questions we cannot answer without more information about slave women's reasoning.²⁰⁸ Asking the question, however, makes it easier to see that a mother's crime against her child may be an act of opposition.²⁰⁹

205. See Higginbotham, *supra* note 204, at 695 ("Did the state prosecute because it cared about the dignity and life of a child born into lifetime slavery with the concomitant disadvantages of Missouri's law? Or did the state prosecute because Jane's master was denied the profit that he would have someday earned from the sale or exploitation of Angeline?").

206. I made a similar argument about the state's interest in prosecuting Black women who use drugs during pregnancy. See Roberts, *supra* note 10, at 1446 ("The history of overwhelming state neglect of Black children casts further doubt on its professed concern for the welfare of the fetus.").

207. See Higginbotham, *supra* note 204, at 695 ("Perhaps the mother felt that the taking of her daughter's life was an act of mercy compared to the cruelty she might confront in Missouri's jurisprudence."); see also Fox-Genovese, *Plantation Household*, *supra* note 137, at 323 (telling the story of a slave woman who killed her fourth child after deciding that "she just was not going to let her master sell that baby"); Hine & Wittenstein, *supra* note 136, at 295 ("Far from viewing [infanticide] as murder, and therefore indicative of lack of love, slave parents who took their children's lives may have done so out of a higher form of love and a clear understanding of the living death that awaited their children under slavery."). Toni Morrison's novel, *Beloved*, explores these same questions in the story of a former slave who is haunted by the spirit of the daughter she killed. Toni Morrison, *Beloved* (1987). For a discussion of *Beloved*'s lessons for the analysis of child abuse, see Ashe, *supra* note 2, at 1022.

208. Elizabeth Fox-Genovese points out a number of uncertainties inherent in the view of abortion and infanticide as resistance against reproduction that preclude a single explanation of female slave resistance:

We have no way of knowing whether slave women practiced abortion—and perhaps infanticide—selectively: Could they, for example, have been more likely to terminate pregnancies, if not lives, that resulted from the sexual exploitation of white men? That, indeed, would have been resistance—perhaps the primary resistance with which to counter the predatory sexuality of white men. At the present state of research, we can at best, say only that the sexual vulnerability and reproductive capacities of slave women influenced the ways in which they resisted. We can say little about the social significance that they attached to that womanhood.

Fox-Genovese, *Focus on Slave Women*, *supra* note 137, at 158. Moreover, infanticide was not a desirable strategy for overthrowing slavery since its sporadic practice would have little effect and its widespread practice would annihilate the race.

209. Although many slavemothers refused to escape the plantation without their children, some did commit the crime of abandoning them. See *supra* notes 137-40 and accompanying text. Slave women who deserted their children could depend on their being fed by the master and reared by the other women of the slave community. Fox-Genovese, *Plantation Household*, *supra* note 137, at 323.

III. IDENTIFYING WITH CRIMINAL MOTHERS

The task of progressive scholars is not just to identify oppressive aspects of law; it is also to describe a vision.²¹⁰ This reconstructive project requires searching for examples of mothering that resist patriarchy and combining them with a "quantum leap" of imagination.²¹¹ Those mothers society considers most deviant may help us imagine what motherhood might be like in a society in which women are "free to develop a sense of self that is our own, and not a mere construct of patriarchy."²¹² After deconstructing society's view of these women it is possible to actually claim their oppositional insights and errors as part of a reconstruction of motherhood. Regina Austin describes how the Black community applies a politics of identification to its lawbreakers:

"The black community" acknowledges the deviants' membership, links their behavior to the "community's" political agenda, and equates it with race resistance. "The community" chooses to identify itself with its lawbreakers and does so as an act of defiance [The politics of identification] demands recognition of the material importance of lawbreaking to blacks of different socio-economic strata, however damaging such recognition may be to illusions of black moral superiority. Moreover, the politics of identification . . . would have as an explicit goal the restoration of some (but not all) lawbreakers to good standing in community by treating them like resources, providing them with opportunities for redemption, and fighting for their entitlement to a fair share of the riches of this society.²¹³

210. See Anthony Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 1005-12 (1990); Fineman, *supra* note 2, 660 (criticizing liberal legal feminists for failing to articulate an "alternative, non-patriarchal legal discourse about Mother"); West, *supra* note 12, at 72 ("Feminism must envision a post-patriarchal world, for without such a vision we have little direction."). Some feminists take the opposite view that feminist struggle can only adopt the negative stance of deconstruction. See, e.g., Julia Kristeva, *Woman Can Never Be Defined*, in *New French Feminisms* 137, 137 (Elaine Marks & Isabelle de Courtivron eds., 1981) ("[A] woman cannot 'be'; it is something which does not even belong in the order of being. It follows that a feminist practice can only be negative, at odds with what already exists so that we may say 'that's not it' and 'that's still not it.'").

211. See Rich, *supra* note 130, at 271; West, *supra* note 12, at 47. On the feminine imagination, see Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 Cornell L. Rev. 644 (1990).

212. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 Berkeley Women's L.J. 191 (1990); see Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 Fla. L. Rev. 25, 33 (1990) (identifying the presentation of oppositional values as a goal of feminist legal methodology: "In fact, the larger social value of feminist methodology may lie in its ability to make explicit oppositional stances vis-a-vis the existing culture.").

213. Regina Austin, "The Black Community," Its Lawbreakers, and A Politics of Identification, 65 S. Cal. L. Rev. 1769, 1774-75 (1992) [hereinafter Austin, *Black Community*]; cf. Regina Austin, *Black Women, Sisterhood, and the Difference-Deviance Divide*, 26 New Eng. L. Rev. 877, 879 (1992) ("In the name of 'black sisterhood,' . . . we might respond to female deviance with understanding, support, or praise based on the distinctive social, material, and political interests of black women."); Mahoney, *supra* note 14, at 15-19 (describing how

Society is less likely to identify with criminal mothers than with other classes of criminals. Austin observes that the Black community rarely embraces Black female lawbreakers, unlike Black male lawbreakers, as rebels against white injustice.²¹⁴ Women violate gender norms when they engage in violence or abandon their children in pursuit of crime. The dominant society's exploitation of these women makes them seem like victims deserving of pity rather than resisters deserving of glorification. "Aggressive and antisocial behavior on the part of black male lawbreakers is deemed compatible with mainstream masculine gender roles and is treated like race resistance, but the same conduct on the part of black females is scorned as being unfeminine."²¹⁵ Male criminologists who studied gangs in the United States and Britain over the last forty years "vicariously identified" with the delinquent boys, romanticizing their deviance.²¹⁶ In contrast, female criminologists have shown little affinity toward their female criminal subjects.²¹⁷

Society's condemnation of female lawbreakers is especially strong for criminal mothers. Mothers who hurt or abandon their children deviate not just from gender norms, but from the quintessential female role.²¹⁸ Even feminists may find it difficult to identify with criminal mothers who harm children because of feminism's uncompromising opposition to male violence against women and children.²¹⁹ Perhaps feminist reluctance to identify with criminal mothers is attributable partially to the way all women have so deeply internalized the dominant images of motherhood.²²⁰

Identification with lawbreakers is not an uncritical acceptance or emulation. For example, Austin points out that a literal association with Black lawbreakers "could be justified only by gross magnification of the damage black criminals actually inflict on white supremacy and a gross minimization of the injuries the criminals cause themselves and other

women's separation from each other, which includes defining battered women as "different" in order to define our own relationships as "normal," limits our resistance to domestic violence).

214. Austin, *Black Community*, *supra* note 213, at 1791.

215. *Id.* at 1791-92.

216. See Heidensohn, *supra* note 1, at 141 (labelling the identification with male offenders as the "delinquent machismo tradition in criminology"); see also John Crowley, *Outlaw Book Rev.*, Aug. 15, 1993, at 6 (reviewing Joyce C. Oates, *Fox Fire: Confessions of a Girl Gang*) (noting how Oates applies the "[r]omantic-mythic possibilities" of literary outlaw male gangs to the girl gang).

217. Naffine, *supra* note 28, at 83 (noting that criminologists pity rather than empathize with female criminals, who are not portrayed as glamorous or impressive); Daly & Chesney-Lind, *supra* note 18, at 519.

218. Marie Ashe reports that in the course of her practice and clinical teaching, the category of clients that students and lawyers seem the most reluctant to represent are mothers who are charged with abusing or neglecting their children. Ashe, *supra* note 2, at 1017.

219. See Washburne, *supra* note 157, at 291 (criticizing feminists for not addressing women's violence against children); see also Tsing, *supra* note 21, at 290 (suggesting that pro-choice activists found it too dangerous to support women charged with infanticide since the activists themselves were labelled as murderers).

220. See Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in *Mothering*, *supra* note 2, at 287, 290 (arguing that even feminist reproductive freedom discourse does not question the assumption that all women will eventually be mothers).

blacks."²²¹

Henry A. Giroux similarly notes that students engage in "a range of oppositional behaviors, some of which constitute resistance and some of which do not."²²² Resistance theorists understand that subordinate groups respond to power in both reactionary and progressive ways. The reactionary response supports the dominant social structure and the progressive response subverts it. When students violate school rules, for example, they may be acting out dominant ideologies of racism or sexism, rather than challenging the repressive aspects of schooling. "Put simply, not all oppositional behavior has 'radical significance,' nor is all oppositional behavior a clear-cut response to domination."²²³

The central pursuit of resistance theory, then, is to distinguish oppositional action that is truly subversive and liberatory from that which merely reproduces the oppressive status quo.²²⁴ A feminist praxis based on identification with criminal mothers must recognize the damage criminal mothers inflict on children, while criticizing society's construction of mothers and celebrating mothers' positive resistance. This is risky territory. It is extremely difficult to discern the transformative potential in what is basically a response to subjugation, as demonstrated by the following two examples of contradictory interpretations of female deviance. Many inner-city female crack addicts have left their children with grandmothers and aunts in order to feed their habit.²²⁵ Is their rejection of childrearing responsibilities an instance of resistance to traditional maternal roles? Philippe Bourgois suggests that the greater female involvement with crack reflects a growing emancipation of inner-city women.²²⁶ Regina Austin observes, however, that these mothers' crack addiction may be more the cause of their "liberated" behavior than a consequence of it.²²⁷

221. Austin, *Black Community*, supra note 213, at 1780.

222. Giroux, supra note 175, at 285.

223. *Id.*

224. Giroux offers this standard:

Thus, the central element of analyzing any act of resistance must be a concern with uncovering the degree to which it highlights, implicitly or explicitly, the need to struggle against domination and submission. In other words, the concept of resistance must have a revealing function that contains a critique of domination and provides theoretical opportunities for self-reflection and struggle in the interest of social and self-emancipation. To the degree that oppositional behavior suppresses social contradictions while simultaneously merging with, rather than challenging, the logic of ideological domination, it does not fall under the category of resistance, but under its opposite accommodation and conformism.

Id. at 290. Giroux also emphasizes that the value of resistance must be measured by the degree to which it contains the possibility of organizing parents, teachers, and students in collective political struggle. *Id.* at 291.

225. See Jane Gross, *Grandmothers Bear a Burden Sired by Drugs*, N.Y. Times, Apr. 9, 1989, S. 1, at 1.

226. See Philippe Bourgois, *In Search of Horatio Alger: Culture & Ideology in the Crack Economy*, 16 *Contemp. Drug Probs.* 619, 643-45 (1990).

227. See Austin, *Black Community*, supra note 214, at 1795; see also Lisa Maher, *Reconstructing the Female Criminal: Women and Crack Cocaine*, 2 S. Cal. Rev. L. & Women's Stud. 131 (1992) (arguing that female crack users remain marginalized and subjugated and that

British criminologist Pat Carlen asserts that the autobiographical accounts of criminal women she collected demonstrate how "under certain material and ideological conditions lawbreaking may comprise rational and coherent responses to women's awareness of social disabilities imposed on them by discrimination and exploitative class and gender relations."²²⁸ She further asserts that, through crime, these women adopt roles that "lift them above social disabilities imposed on them as women."²²⁹ However, this interpretation of criminal women's conduct as emancipatory is partially contradicted by their own assessments of the chaos in their lives.²³⁰ Moreover, female lawbreakers tend to hold traditional views about family roles.²³¹ Perhaps their involvement in crime is merely a response to their economic marginalization, similar to that of men.

Identification with criminal mothers, presents the danger of valorizing or excusing violence, and, in the process, denying women's agency.²³² Alternatively, it is plausible that mothers' deviant behavior is purposeful.²³³ This assumption dignifies women, even though their actions may be reprehensible. Purposeful agency theory allows us to identify the features of social and political context that lead women to defy the norms of motherhood.²³⁴ A critical stance also allows us to distinguish acts of rebellion which hurt ourselves and our children from those acts that attack the systemic sources of mothers' subordination.²³⁵

This Article does not suggest a simplistic approach that excuses all mothers who hurt their children. Rather, this Article proposes a more complicated analysis that considers mothers' political situation. The current analysis judges the battered mother who fails to protect her child from a violent father against whom she herself is struggling, the desperate teenager who abandons her unwanted baby, and the violent mother who beats her toddler to death for wetting the bed, for their failure to conform to a standard of selfless motherhood. This Article suggests feminist theory change our focus from the state's definition of criminal mothers, which arises from racist and patriarchal norms, to an analysis that evaluates

their participation in crime cannot be seen as "emancipatory"); *cf.* Roberts, *supra* note 16, at 28-29 (considering whether the unwed motherhood of Black teenagers is an example of resistance to traditional patriarchal marriage).

228. Carlen, *supra* note 1, at 28.

229. *Id.*; *see also* Austin, *Black Community*, *supra* note 214, at 1796 (observing that hustling offers street women more excitement, independence, and flexibility than straight life).

230. *See* Morris, *supra* note 1, at 67.

231. Naffine, *supra* note 28, at 101-03; Daly & Chesney-Lind, *supra* note 18, at 511.

232. *See* Chodorow, *supra* note 81, at 93-94; Ashe & Cahn, *supra* note 19.

233. *See* Cloward & Piven, *supra* note 165, at 651; *cf.* Stark & Fitchcraft, *supra* note 170, at 344 (criticizing social science conceptions of family violence: "Instead of revealing female subjectivity as intensely purposive and rational, it is shown to be irrational and to draw its purposes genetically from a pathological environment.").

234. *See* Cloward & Piven, *supra* note 165, at 651.

235. *See* Chodorow, *supra* note 81, at 94 (criticizing the assumption that all mothers' reactions to oppression are equally correct as political actions); Austin, *Black Community*, *supra* note 213, at 1785 (noting limitations of black lawbreakers' rebellion); *see also* Chambliss, *supra* note 28, at 234 (rejecting the theory that all criminality of the oppressed can be attributed to class oppression).

mothers' opposition to those norms. This change in analysis produces a theory of motherhood and crime that can help to transform the institution of motherhood as it exists today.

CONCLUSION

Whenever I read the horrible facts of child abuse cases it always produces an image in my mind of mothers and children trapped in a prison, struggling desperately to get out. Our mission must be to release them. Adrienne Rich powerfully claimed that this will require nothing less than abolishing the present institution of motherhood.²³⁶ But she goes on to explain: "To destroy the institution is not to abolish motherhood. It is to release the creation and sustenance of life into the realm of decision, struggle, surprise, imagination, and conscious intelligence, as any other difficult, but freely chosen work."²³⁷ The task of legal scholars and activists

236. Rich, *supra* note 7, at 280. Ending violence requires radical change. *See* Revelation 21:4 ("There will be no more death or mourning or crying or pain, for the old order of things has passed away.").

For a critique of Rich for accepting "fantasy" as a self-evident basis of political theory, see Chodorow, *supra* note 81, at 83-84. Chodorow interprets Rich as implying that patriarchal institutions have distorted a natural maternal essence and that once patriarchal constraints are removed, mothering will be perfect. *See also* Alcoff, *supra* note 27, at 408-12 (criticizing Rich for premising her work on the belief that there is an innate female essence). My agreement with Rich's vision of a liberated motherhood is not premised on a romanticized belief in a maternal essence. Rather, it relies on the historical resistance of the oppressed to the institutions that dominate them. One way to avoid the temptation to fantasize about mothering is to engage in the hard work I described above of discerning in the criminal and otherwise deviant behavior of mothers what is true resistance to oppression.

237. Rich, *supra* note 7, at 280. Other feminists reject the possibility of discerning a liberated aspect of motherhood; they advocate that women should abandon mothering altogether on the ground that it inevitably reproduces patriarchy. *See, e.g.,* Shalumith Firestone, *The Dialectic of Sex* (1970) (advocating artificial reproduction on the ground that procreation by women is inherently oppressive); Allen, *supra* note 25, at 316 ("I am endangered by motherhood. In evacuation from motherhood, I claim my life, body, world, as an end in itself."). I disagree with this position for several reasons. First, it presumes that nature rather than male power is responsible for motherhood's oppression of women. Second, it does not account for the particular oppression of Black women whose motherhood has historically been devalued and who still struggle for society's respect for their decision to become mothers. Third, rejecting motherhood altogether denies women the joy many experience in mothering, despite its dangers. Finally, evacuation from motherhood will not necessarily change the institution of motherhood since women who refuse to become mothers will still be defined and constrained by the dominant meaning of motherhood.

It is also questionable that requiring men to participate more in childrearing by itself will eliminate mothers' subordination. Shared parenting alone, without fundamental changes in gendered institutions, may lead to a *reduction* in women's power. *See* Becker, *supra* note 12, at 203-17 (stating the advantages of a maternal deference standard in child custody decision making); Diane Ehrensaft, *When Women and Men Mother*, *in* *Mothering*, *supra* note 2, at 41 (arguing that men gain more from shared parenting than women); Kittay, *supra* note 25, at 122 (pointing out that male usurpation of the previously female prerogative of midwifery has harmed women); Young, *supra* note 11, at 142 (criticizing Dinnerstein's and Chodorow's suggestion that exclusive parenting of infants by women is the cause of male domination). *See generally* Fineman, *supra* note 81 (arguing that the shared parenting ideal disadvantages custodial mothers and their children). *But see* Katherine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 *Berkeley Women's L.J.* 9, 32-35 (1986) (advocating joint custody because it promotes the view that both parents should participate in

must be to use the law, as much as it will permit, to aid this release of motherhood. We must help to release motherhood from an institution that negates women's selfhood and uses children as hostages to compel women's obedience. Then, we must begin the difficult work of transforming motherhood by supporting oppositional acts of mothers that truly resist oppression and by redirecting those mothers whose reactionary acts perpetuate the current oppressive regime of motherhood and child abuse.

The task, then, is not as simple as viewing criminal mothers as either pathetic or liberated women. It may be deviant mothers, rather than compliant ones, who reveal the mechanisms by which the institution of motherhood confines women and the price women pay if they resist. We must condemn mothers' violence against their children. However, their violence may force us to confront the complexity of women's subordination and the radical measures we must take to eradicate it.

childrearing). *See generally* Dorothy Dinnerstein, *The Mermaid and the Minotaur* (1976); Czapanskiy, *supra* note 24 (proposing a reconceptualization of parenthood which places on parents an ungendered responsibility to provide childcare).